IN THE

Supreme Court of the United States

Condensed Brief for Cross Appellants, on the Merits

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STATEMENT OF CASE

An appeal from two decrees rendered March 21, 1908, and April 14, 1908, in equity cause No. 25,980 lately pending in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, was taken by the United States to the Circuit Court of Appeals for the Seventh Circuit.

From the same decrees Oberlin M. Carter *et al.*, the persons made appellees in the direct appeal, entered a cross appeal.

The Circuit Court of Appeals on March 18, 1909, entered their opinion and decree. From that decree the United States entered their appeal to the Supreme Court of the United States, from certain allowances made to Oberlin M. Carter and his counsel from the fund, decreed to belong to the United States, and Oberlin M. Carter *et al.* entered their cross-appeal on the merits, to this court.

The bill was filed by the United States in the Circuit Court for the Northern District of Illinois on August 27, 1901. The principal defendants were Oberlin M. Carter, formerly an officer in the Corps of Engineers of the United States Army, I. Stanton Carter, his brother, and Lorenzo D. Carter, his

uncle. The other parties came into the cause only as custodians of certain of the assets in controversy, or as claiming allowances for fees or compensation from the assets in court.

The principal defendants filed demurrers to the bill, which they afterwards withdrew and then they filed answers, to which replication was filed.

A large amount of evidence was taken before examiners and masters, and certain evidence taken in certain other related proceedings, was used by agreement as if taken in the present cause.

The main issues were determined by the lower court itself, but on one branch of the case (an accounting from I. S. Carter and L. D. Carter) a reference was made to a special master (Booth) and those matters went before the court on exceptions to the master's reports.

The Bill.

The bill briefly stated charges that from about the year 1888 until the 20th day of July, 1897, continuously, Oberlin M. Carter was an officer of the United States Army in the Corps of Engineers and as such engineer in local charge in the Southern Judicial District of Georgia of what is usually called the "Savannah District" for the improvement by the United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah District during said period.

This allegation is admitted in the answer of O. M. Carter. (Vol. 1, p. 124.) The answers of L. D. Carter and of I. Stanton Carter adopt the answer of O. M. Carter. (Vol. 1, p. 139 and 141.)

Carter's Duties and Discretions.

The bill charges (Vol. 1, p. 2) that as such officer in charge of the said Savannah District Oberlin M. Carter was vested with sundry powers, duties and discretions among others:

> "With power, duty and discretion in proposing from time to time to his superiors for adoption, projects for the expenditure of moneys appropriated by Congress for the improvement of rivers and harbors in said Savannah District."

The answer of O. M. Carter denies this averment, and then admits (Vol. 1, p. 124) as follows:

> (a) "He admits that when specifically ordered by his military superiors to propose, that is, to prepare and submit, a plan or project for the improvement of any particular river or harbor, it then became his duty to obey such orders. Any plan of improvement thus submitted by him in obedience to direct orders was considered by his military superiors, approved by them in whole or in part, or entirely disapproved. When such revised plan finally received the sanction of the War Department, it then became official."

As illustrations in evidence of such a project of expenditures of the money appropriated by Congress, submitted and recommended by Carter to the Chief of Engineers, see Vol. 3, pp. 1393-4 and Vol. 23, p. 11232.

The bill charges that Carter was vested as such officer:

> "With power, duty and discretion in devising, drafting and proposing from time to time to his superiors for adoption, specifications for contracts for such river and harbor improvements proposed to be made in said Savannah District."

The answer of O. M. Carter denies this averment and then admits it, as follows (Vol. 1, p. 125):

> (c) "He admits that when once a plan or project for the improvement of any river or harbor had been approved by the War Department, and officially assigned

to him as local engineer for execution, and that when funds for work thereunder became available, he was ordered—and it then became his duty—to prepare and submit to his military superiors for their consideration and approval or disapproval, specifications for the work proposed, when such work was to be done by contract."

As illustrations in evidence of submission of specifications for contracts submitted by Carter to the Chief of Engineers through the Diivsion Engineer (see Vol. 3, p. 1459; also Vol. 23, p. 11193; also Carter's letter, Vol. 18, p. 8946) the original specifications (Defts. Ex. G 1, forwarded by Carter and certain comments by the Division Engineer as to the specifications, Vol. 18, p. 8948).

The bill charges that Carter was vested as such officer:

"With power, duty and discretion in from time to time drafting and proposing to his superiors for adoption, forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction for such proposed river and harbor works."

The answer of O. M. Carter admits this allegation. (Vol. 1, p. 125 (d).)

The bill charges that Carter was vested as such officer:

"With power, duty and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids."

The answer of O. M. Carter denies this allegation and says:

(e) "He admits that when ordered to submit for consideration a form of advertisement, it became necessary for him to propose a time for the opening of proposals for the work, but the approval or disapproval of his suggestion rested with the War Department, by whose orders he was governed."

The issue on this point is one of the hotly contested issues in the case. The evidence that the time during which these very large contracts were advertised was wholly inadequate

and resulted in little or no competition and exorbitant prices, could hardly be controverted because it is documentary, but Carter to relieve himself of responsibility for it has attempted to throw the responsibility on his superior officers in the War Department, who he claims approved the suggestions made by him as to fixing the time. The Government contends that both by the regulations and by the practice the responsibility for fixing the length of time the advertisements were to run was placed upon Carter.

The regulations and the evidence on this subject are treated fully in appellant's main brief under the head of "Abuse of discretion in the shortness of advertisements." (pp. 122 to 156.)

It is insisted by the Government this evidence shows that the responsibility for the shortness of advertisement rests wholly with Carter, but even if it were otherwise and if his superiors had approved of inadequate time on his recommendation, that if his motive for such recommendation were corrupt it would not excuse him.

The bill charges that Carter was vested as such officer:

> "With power, duty and discretion in proposing from time to time to his superiors for adoption, and causing to be fixed, and fixing for such contracts to be let, the time designated in the specifications within which the successful bidder would be required to commence work."

The answer of O. M. Carter denies this allegation, and avers (Vol. 1, p. 125):

> "The component paragraph of the specifications prescribing the time within which a successful bidder would be required to commence work, is approved or disapproved by the Chief of Engineers, who alone is vested with the power to fix the time aforesaid."

But this averment of the answer must be taken in connection with the proof and with the admission of the answer, paragraph "D" above, in which he admits that all of the terms of the specifications which include the "component par-

agraph" referred to, were first drafted by Carter and recommended by him to his superiors for adoption.

The bill charges that Carter was vested as such officer:

"With power, duty and discretion in giving out information in regard to such contracts to be let.

With power, duty and discretion in from time to time receiving proposals for, and recommending to his superiors the awarding of such contracts."

The answer of O. M. Carter admits these allegations. (Vol. 1, p. 126 (g) and (h).)

As an illustration of such recommendations made by Carter for accepting bids received. See Carter's recommendation to the Chief of Engineers that the bid of D. V. Howell who bid 67 cents per cubic yard for mattresses for Brunswick Harbor contract of 1889 be rejected, for "informalities" and that the bid of Chas. C. Ely of $1.34 per cubic yard be accepted. Ely for Greene & Gaynor, thus getting the contract. (Main Brief, pp. 182-3.)

The bill charges that Carter was vested as such officer:

"With power, duty and discretion in approving or rejecting the bonds required to be given by such contractors."

The answer of O. M. Carter admits this allegation. (Vol. 1, p. 126 (i).)

The bill charges that Carter was vested as such officer:

"With power, duty and discretion in superintending the work being done by contractors under such contracts in said Savannah District; and in approving and accepting or rejecting material being put in, and work done by such contractors in said Savannah District, according as the same was in accordance with the requirements of such contracts or not."

The answer of O. M. Carter admits this allegation. (Vol. 1, p. 126 (j).)

The bill charges that Carter was vested as such officer:

"With power, duty and discretion in from time to

time approving modifications of such contracts and suggesting to his superiors the adoption of such modifications."

The answer of O. M. Carter says:

"He denies that he was vested with power, duty or discretion in approving modifications of contracts; but he admits that it was his duty to suggest for the consideration of his military superior any modifications which seemed to him advisable, but he was governed entirely by their orders in the matter." (Vol. 1, p. 126k.)

That Carter did have and exercise that discretion, is shown by his actual entry into the supplementary articles of agreement of March 17, 1897, with the Atlantic Contracting Company, subject to the approval of the Chief of Engineers. (Vol. 24, p. 11350.) And that he recommended its approval by his superiors is shown by his letter of March 17, 1897, to the Chief of Engineers. (Vol. 24, p. 11348.) That supplemental contract provided for as much as 2,000,000 cubic yards of dredging at the discretion of the Engineer at 25 cents per yard, or $500,000.00 to be done by the Atlantic Contracting Company without competition. The price was exorbitant, Major Gillette who succeeded Carter testified that another contractor (Moore) had later offered to do the same dredging at 10 cents per cubic yard (Vol. 5, pp. 2207-8) and a contract was let in 1900 after competition at 16 cents per cubic yard. (Vol. 17, p. 8229.) The supplemental contract approved by Carter was rejected by the Secretary of War. (Vol. 9, p. 4301.)

As an illustration of a supplemental contract which was made by General Gilmore when he was in charge of the district, see Articles of Agreement of December 22, 1886, approved by the Secretary of War January 12, 1887. (Vol. 22, pp. 9921-6.) Also see supplemental contract made by Carter with W. T. Gaynor May 6, 1889, approved by Secretary of War June 10, 1889. (Vol. 22, pp. 9981-6.) Also see supplemental contract made by Carter with A. J. Twiggs November

6, 1893, approved by Secretary of War December 7, 1893. (Vol. 22, pp. 10299-10304.)

The laws and regulations affecting the right to modify contracts after they have been once let by competitive bids, is treated in Appellant's Main Brief, pp. 235-6.

The bill charges that Carter was vested as such officer:

> "With power, duty and discretion in from time to time approving or rejecting the accounts rendered to him by such contractors for material furnished and work done by them under contracts let according as such accounts should be fair and honest or false and fraudulent.
>
> With power, duty and discretion, when in funds intrusted to him as a disbursing officer, in from time to time paying such contractors or refusing to pay them, the amounts claimed by them to be due them for material furnished and work done under such contracts let, according as such claims were fair and honest or false and fraudulent."

The answer of O. M. Carter admits the foregoing allegations. (Vol. 1, p. 126 l and m.)

The Scheme Devised to Defraud.

The bill charges that on or about the year 1891 the said Oberlin M. Carter, one Benjamin D. Greene, one John F. Gaynor, one William T. Gaynor, one Edward H. Gaynor, and one Michael A. Connolly (hereinafter referred to as the conspirators) devised, concocted and put in operation a certain fraudulent scheme for the purpose of defrauding the United States. The scheme is elaborately set out in the bill, (Vol. 1, pp. 3-7), but the gist of the averments are that Carter was to so exercise the discretions of his office as to suppress competition with Greene and the Gaynors or their agents, for jetty contracts to be let, (1) by shortness of advertisements, (2) by withholding as far as practical, speci-

fications from other proposed bidders, (3) by drafting specifications so as to mislead other proposed bidders as to the character and quantities of material really intended to be used in the work under the contracts, (4) by fraudulently secretly furnishing in advance to his co-conspirators information as to the bids, and as to his course as Engineer Officer in charge in the construction of the work under the contracts, (5) to the end that the said conspirators in the name of some one of them, or of some other person or corporation for their benefit, would be the only real bidders for such contract work for construction of jetties, spur-dams and training walls, for the improvement of the rivers and harbors in said district. That thus all such contracts would be obtained by the conspirators or by some person or corporation for them, at high and exorbitant cost to the United States, and at great profit to the said conspirators.

It is further charged that the scheme contemplated that Carter would so exercise his discretion in drafting the specifications that they would provide for two or more designs of mattresses, one being a cheap design, and the others much more costly designs, but to be bid on at one price per square yard. That he would secretly inform his co-conspirators which design he would use in the work, but the public or outside bidders would not be so informed, so that such outside bidders would have to bid on the most costly type of mattress, while the conspirators or the person or corporation acting for them could bid a lower price, knowing that they would be called upon only for the cheapest design, but such lower price would still be a very high price for the cheapest design. In this way the conspirators would obtain all the contracts, and Carter would exercise the discretion reserved to him as engineer in calling only for the cheapest design of mattresses to be put in the work.

It is further charged that the scheme contemplated that Car-

ter would draft the specifications so vaguely, and so uncertainly set forth the character, quality, quantity, description and design of material to be used in the work so that the specifications by a lax construction to be put upon them by Carter, would apparently cover large quantities of material of very poor and cheap quality, description and design, and of very small value to the United States, whenever the contract work was being done by the conspirators, but so that if by chance any person not a party to the scheme should get any contract, Carter could and would construe the specifications so unfairly, rigidly and stringently, that the specifications would be made apparently to justify the rejection which Carter would make of material of very much better quality, quantity, description and design, and of greater value to the United States, with intent that by such oppressive rejections, the performance of such contracts would be made ruinous to the contractor so having dared to compete with the conspirators.

It is further charged that the scheme contemplated that Carter as Engineer in charge, on the contracts obtained by the conspirators, would so instruct and locate the Assistant Engineers under him that there would be little, if any, inspection of the details necessary to be inspected to insure the furnishing of honest work and material. And that Carter as such Engineer Officer in charge would fraudulently accept for the Government under such contracts, work done and material furnished known by him to be of inferior quality and quantity, and not in accordance with the specifications, to the end that the United States might be defrauded with enhanced profits to the said conspirators.

It is further charged that the scheme contemplated that Carter as such Engineer Officer, would fraudulently approve for payment and when in funds as a disbursing officer, pay, accounts which would be rendered to him as such Engineer Officer in charge, by the said conspirators, or by the person act-

ing for them who should have obtained the contracts through the operation of the said scheme to defraud, and which accounts should be rendered as aforesaid for such inferior material and work and at the exorbitant prices stated in such contracts so fraudulently to be obtained by the said conspirators.

It is further charged that the scheme contemplated, that the said moneys so fraudulently obtained on such contracts by the conspirators through the said Oberlin M. Carter, as such engineer in charge, and disbursing officer, should be appropriated to the use of the said conspirators, and that they should aid each other in the concealment, from the officers of the United States, not parties to the conspiracy, of the moneys from time to time so misappropriated and of the investments thereof; to the end that said scheme might be further operated by them and that they might be secure from detection in the enjoyment of such moneys.

It is further charged that the scheme contemplated that out of the moneys so to be fraudulently appropriated by the said conspirators, as aforesaid, certain portions should be appropriated by the said William T. Gaynor and Edward H. Gaynor and smaller sums by said Michael A. Connolly, and that the net profits of such contracts, after payment of said sums and the cost of the work would be divided between the principal conspirators, Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter.

The Scheme to Defraud Put in Operation.

It is further charged in the bill that pursuant to the said scheme to defraud, said Oberlin M. Carter, and the said conspirators did on about the first day of January, 1891, commence to put the scheme in operation in the Savannah district, and the said Carter commenced to exercise the said pow-

ers, duties and discretions of his office in favor of the said conspirators and against the United States in accordance with said fraudulent scheme, and they continued so to do as successive contracts were to be let and were let from time to time by said Oberlin M. Carter as such Engineer Officer in charge until on or about July 20, 1897, when said Carter was superseded as such officer in charge, and that the said conspirators have continued, up to the time of the filing of the bill, to aid and abet each other in the concealment of the money so fraudulently obtained.

The answer of O. M. Carter denies the allegations of the bill as to the formation of the scheme to defraud, and also denies that such scheme was ever put in operation, in the Savannah district. (Vol. 1, p. 126(a) (b).)

A very large part of appellant's main brief is taken up in briefing the evidence relied upon to establish the conspiracy to defraud charged, and the subject will be treated herein later.

Description of the Engineering Work.

The bill then charges and describes the principal features of the engineering work which had been carried on in the Savannah district under General Gilmore, the predecessor of Carter and for a time under the latter (Vol. 1, pp. 8 to 11) by which the spur dams and training walls (included under the generic term jetties), which were located so as to narrow a channel or control the flow of the current of the rivers or tidal estuaries, were built up by the use of "log and brush" mattresses and stone, or "brush fascines" or "brush fascine mattresses," and stone.

The answer of O. M. Carter to these averments, are a denial, then followed by admissions, and statements in avoidance. (Vol. 1, p. 127.) Allegations of the bill on this point are fully

established by the contracts in evidence, but these will be considered herein later.

Details of the Fraud Introduced Into and Under the Contracts.

The bill then sets forth the details of the frauds charged, introduced by Carter into the specifications commencing with contract No. 4572 for Cumberland Sound, let May 4, 1891, running through each successive jetty contract let in the district until Carter was superseded in 1897. A list of the jetty contracts (fourteen in number), which it is averred were so fraudulently awarded to the conspirators or to some person or corporation for them at exorbitant and fraudulent prices, is given. (Vol. 1, pp. 16-17.) This list embraced every jetty contract let during that period in the district except contract No. 5359 of July 15, 1893, a comparatively small contract let for the upper Savannah river below Augusta, Georgia, and as to this contract it is charged that Carter applied such stringent and unfair construction to the specifications as to make the performance of the contract ruinous to the contractor, and thus prevented him from further competition with the conspirators.

And it is averred that under each and all of the contracts so fraudulently let, the said Carter as such Engineer Officer in pursuance of said scheme to defraud the United States allowed the said contractors to put in cheap and inferior material not in accordance with the specifications in the contracts and fraudulently exercised in favor of the contractors the options so fraudulently reserved to him in the specifications as engineer in charge. And that under each of which contracts, the said Carter as such Engineer Officer in charge in pursuance of said fraudulent scheme approved for payment and paid whenever in funds as disbursing officer, the accounts of the said contractors for such work at the high, ex-

orbitant and fraudulent prices so provided in said contracts so fraudulently let.

The answer of O. M. Carter is a general denial of all these averments. (Vol. 1, p. 129.) The fact that the work under all the fourteen contracts specified in the bill (Vol. 1, pp. 16-17) as having been let to the conspirators or for some person or corporation for them, were in fact executed by Benjamin D. Greene and John F. Gaynor, and that the contract money went to them, is fully established by the documentary and other evidence collected in appellant's Main brief, pp. 105 to 115.

The fact that the profits of all these contracts were divided between Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter month by month, appellant insists is fully established by the evidence collected under the head of "Divisions" "1" to "32," inclusive in appellant's main brief, pp. 554 to 834.

The details of the frauds charged to have been introduced into the specifications and into the execution of the work under these contracts will be considered later in connection with the evidence as to the engineering features of the case.

The Division of the Money.

The bill then charges that it was not known to the complainants what exact share of the profits of the contracts so fraudulently let, was allotted and apportioned to O. M. Carter prior to contract No. 4820 of September 16, 1892, but that on said prior contracts amounts aggregating $16,000, were traced with reasonable certainty from the profits of said contracts back into the possession of Oberlin M. Carter, after he had as disbursing officer paid out the same on the contracts.

The bill then charges that commencing with contract No. 4820 of September 16, 1892, and running through all the other

contracts charged to have been so fraudulently let, profits in excess of $2,000,000, were divided from time to time between Oberlin M. Carter, Benjamin D. Greene and John F. Gaynor in three equal shares, one of which shares was apportioned to Oberlin M. Carter as his share of the profits arising from the consummation of said scheme to defraud the United States.

The answer of O. M. Carter denies these averments. (Vol. 1, p. 131.)

The proofs of the averments are referred to above, and will be considered herein later.

Carter's Investments.

It is charged in the bill, that following the formation of the scheme to defraud in 1891, the said Oberlin M. Carter passed from the condition of a borrower to the condition of a capitalist, by the investment of the greater portion of his shares of the fraudulent and illegal profits of the contracts so fraudulently let by him as engineer in charge as aforesaid. That these invsetments were secretly made by the said Oberlin M. Carter in stocks, bonds, loans and real estate, the particulars of which investments were not known to the complainants until within the year preceding the filing of the bill, because of the means taken by said Carter to conceal the same.

The complainant (Vol. 1, p. 23) attached as Exhibit E to the bill (see Vol. 1, pp. 53 to 86) a statement of the divisions of the profits between B. D. Greene, John F. Gaynor and O. M. Carter showing as charged the amount of profits traced from the disbursing checks issued to the contractors back into Carter's hands, and giving a list of the securities and other property which it is charged were purchased by or for Carter with his share of said profits, from time to time as the divisions of profits were made.

It is charged that these investments claimed to have been

traced from Carter's share of the profits from 1891 to 1897 aggregated at cost some $690,301.85.

The bill then charges certain special facts as to certain of the alleged Carter investments described in Exhibit E, to-wit: as to the investment in real estate known as the 8th avenue New York property; as to the investment known as the Bierne Gordon notes secured by an insurance policy and real estate mortgage; as to the investment in real estate known as the Orange, New Jersey, property.

It is charged in the bill, that all of the holders of the said assets constituting the investments made with Carter's share of said illegal profits, who were holding the same for Oberlin M. Carter or holding the same with notice of the fraud charged, held the same under the implied trust to account to the complainant for the same or for the proceeds thereof, and to turn over, deliver and convey the same to the complainant upon demand. (Vol. 1, pp. 24, 25, 27, 28.)

A Portion of the Investments Transferred to the Northern District of Illinois.

It is charged in the bill (Vol. 1, pp. 28 to 32) that Oberlin M. Carter shortly after the confirmation of his Court Martial sentence as hereinafter referred to, caused to be delivered to his brother, I. Stanton Carter, and his uncle, Lorenzo D. Carter, for concealment and safe keeping a large amount of the stocks and bonds and notes, and proceeds thereof, constituting the investments described in Exhibit E with a part of Carter's share of the diverted trust fund. That in addition I. Stanton Carter had received and was holding the proceeds of a $23,000 mortgage loan negotiated for O. M. Carter on the 8th avenue, New York, property. Also certain collections of coupons and dividends and rents are set forth in detail as having been made

from the proceeds of said trust investments by I. Stanton Carter and L. D. Carter, and certain sales of securities constituting a part of said original investments of the diverted trust funds are charged to have been made and the proceeds reinvested by I. Stanton Carter and L. D. Carter in other securities described through bankers and brokers at Chicago.

The bill charges (Vol. 1, p. 28) that all these assets constituting investments of the diverted trust fund and proceeds thereof, were brought into the State of Illinois, and that I. Stanton Carter and L. D. Carter now (at the time of the filing of the bill) hold the said assets for the benefit of the said Oberlin M. Carter, but with full notice of complainant's rights and equities therein, and with the duty imposed upon them by law to account to the complainant for the same as a trust fund.

(I. Stanton Carter and L. D. Carter, it is charged, are both citizens and residents of the State of Illinois, the former residing in Chicago, Illinois, and the latter in Oakland, Illinois. Both submitted to the jurisdiction in the Northern District of Illinois, though auxiliary bills were filed in both districts.)

Carter's Answer as to the Investments.

The answer of O. M. Carter (Vol. 1, p. 131) states:

> "This defendant denies that he ever made any investments in stocks or bonds or loans or real estate or in anything else secretly, or that he ever made any investments of any kind except out of his own money or as agents for others, and denies that he ever made any investments either for himself or for others out of money, belonging to the United States or coming in whole or in part from any contracts or contractors with the United States. This defendant denies that he ever at any time owned or claimed to own, either directly or indirectly, or that any one else held for him in trust or otherwise or that he ever possessed or held, except as agent for others, money, property and things of pecuniary value of

$10,000 over and above what was given to him from time to time as a pure donation by his father-in-law, the late Robert F. Westcott."

The Board of Inquiry—The Transfer of the Securities.

It is charged further in the bill (Vol. 1, p. 32) that Carter's successor, Captain C. E. Gillette, took charge at Savannah July 20, 1897, that Carter left August 7th, 1897, for England under appointment as military attache. That very shortly after he took charge Gillette reported that he found certain irregularities in Carter's administration. That a Board of Officers of which Colonel (now General) Gillespie was president, was appointed by President McKinley to examine into the matter.

Carter returned to New York, arriving there on the night of September 10, 1897.

It is charged in the bill that on his return Carter expected to be arrested and took out of his safety deposit box in New York a large amount of securities consisting of a part of the investments described in Exhibit E to the bill which he had made from his share of the illegal profits of the contracts and turned them over to the said Benjamin D. Greene and John F. Gaynor at the Hoffman House, New York, for safe keeping. That of these securities some $414,437.50 were in a day or two delivered by said Greene to Robert F. Westcott for safe keeping for said O. M. Carter, and Westcott placed them in his own safe deposit box.

"That shortly thereafter the facts in regard to Carter's guilty connection with the said Benjamin D. Greene and John F. Gaynor began to be given publicity in the newspapers and the said Robert F. Westcott upon the advice of his counsel, and in the presence of his counsel, delivered back to Carter all of the aforesaid securities so turned over to Westcott by said Greene, and took said Carter's receipts for the same in detail, which receipts

are dated respectively October 11, 1897, and October 29, 1897, and which original receipts came to the knowledge of complainants on or about July, 1900."

The facts on which the above charge as to the shifting of the securities from Carter to Greene in September, 1897, and then to Westcott and their return to Carter in October, 1897, were based primarily upon the testimony of Robert F. Westcott given in the removal proceedings against Greene & Gaynor before Commissioner Shields in New York in 1900. (Vol. 24, pp. 11253 and 11256-7 and 11264.)

This evidence was objected to by Carter because he was not a party to the removal proceedings, R. F. Westcott died before his testimony could be taken in this proceeding. But his testimony was proved, and offered against I. S. Carter and L. D. Carter who are claiming an interest as *bona fide* purchasers for value without notice in some of these assets, to charge them with notice that Westcott had repudiated Carter's claim that the assets were gifts from him. A knowledge of Westcott's testimony having been brought home to them, and indirectly it is offered against O. M. Carter because it is the contention of the Government that the claims of I. S. and L. D. Carter as *bona fide* purchasers without notice in respect to lien for salaries set up by them is merely a dodge to save that much of the assets for him. The question of fact and the law involved as to the admissibility of R. F. Westcott's testimony on that point and for that purpose is treated in Appellant's Main Brief, p. 651 to 654. The Circuit Court of Appeals (Rec., Vol. 33, p. 13425) excluded R. F. Westcott's testimony, except on the question of *bona fide* purchasers. (Rec., Vol. 33, p. 13430.) The essential facts however are now proved independently of Westcott's testimony. (Main Brief, p. 648.)

(1) The fact that all the securities described in the receipts of October 11, 1897, and October 29, 1897, were in Carter's possession prior to his leaving for Europe in August,

1897, is proved by the fact that Carter had collected in May, June, July and August, 1897, and deposited in his personal account all the coupons and dividends thereon which were collected and applied the same to his personal use. (See Main Brief, p. 823.) This is evidence not only of Carter's then physical possession of the securities but also of his beneficial ownership.

(2) The fact that Westcott while in possession of the securities told Dr. F. P. Solley that they were Carter's securities, that B. D. Greene shortly after Carter's return from Europe had delivered them to Westcott to hold for Carter, and that Solley at Westcott's request had accompanied Westcott to Stimson's office on October 29, 1897, when the securities were delivered to Carter is proved by the testimony of Dr. Solley in this case. This is objected to by the defense but is admissible as a declaration against his own title by Westcott while in possession, made by Westcott under whom Carter now claims title as a gift on October 29, 1897. (See Main Brief, p. 648.)

(3) The fact that Carter was under fear of arrest at the time of his return from Europe is shown by his own testimony to the effect that on his return to New York he received a letter from the Chief of Engineers dated September 10, 1897, directing him to consider himself under arrest. (Vol. 14, pp. 6306-8.)

(4) The fact that the securities were delivered to Carter by Westcott on October 11 and 29, 1897, is proved by the receipts in evidence admitted to be signed by Carter in his own handwriting (see Main Brief, pp. 825 and 827) on which are listed securities all of which are shown to have been purchased in the aforesaid "Divisions," aggregating at cost some $414,437.50. And see Stimson's testimony as to Carter's effort to make Westcott a present of some of the securities on October 29, 1897. (Main Brief, p. 830.)

Carter's Answer as to These Assets and Receipts.

The answer of O. M. Carter (Vol. 1, p. 136) states under oath:

> "This defendant denies that in September, 1897, or at any other time this defendant took out of his safety deposit box or from anywhere else any securities described in Exhibit E or elsewhere or that at that time or at any other time he turned any securities over to Benjamin D. Greene and John F. Gaynor, or to either, at the Hoffman House, or anywhere else for safe keeping, or for any other purpose, or that any securities were ever delivered by said Greene and Gaynor or by either of them to Robert F. Westcott for safe keeping for this defendant, or for any other purpose, or that said Westcott delivered back any securities to this defendant at any time, *or that any of the securities described in said receipts of October* 11, 1897, *and October* 29, 1897, *ever belonged to this defendant, or that he ever had any interest therein directly or indirectly until the same were respectively given to this defendant as a pure and original donation by said Westcott at the time of said respective receipts in October,* 1897."

The above sworn answer by Carter to the bill was filed February 1, 1902. (Vol. 1, p. 123.)

Carter waited until the Government had produced before him under notice every scrap of paper having his signature bearing on the case (see Main Brief, p. 541), and after the Government had closed its testimony on the direct, February 16, 1904 (Vol. 11, p. 5227) Carter took a year to incubate a possible defense, and came on the stand in January, 1905, with his diaries and entries therein alleged to have been made through a period of five years, and setting up a theory of defense wholly in conflict with the above sworn answer.

He now claims that the $63,000 of securities disclosed in the receipt of October 11, 1897, were *not* received as an original donation at the date of the said receipt, but he claims they

were given him in exchange for Carter's half interest in the Orange, N. J., property and for the 8th avenue property. See Carter's statement of his alleged transactions with Westcott (Dfts. Exh. 96F, Vol. 20, p. 9590). But of which alleged transfer on October 11, 1897, of Carter's half interest in the Orange property to Westcott there is not a particle of evidence, except Carter's oral testimony, and that is in conflict with the recitals in the written settlement made by Carter with Westcott on October 29, 1897, as to the Orange property. (Vol. 24, p. 11289.) Carter admits his signature to that document. (Vol. 14, p. 6268.)

He now also claims that $30,000 of the bonds described in the receipt of October 29, 1897, had been recognized as his by Westcott continuously for four years as part of Carter's wife's alleged estate, and produces his own diary entries, and a statement made by himself of repeated settlements between him and Westcott in which the income from said particular bonds are always treated as Carter's. And he now claims that he traded those bonds to Westcott on May 10, 1897, and Westcott made him a present of them again along with all the other securities in the receipt of October 29, 1897. (See Deft. Exh. 96F, Vol. 20, pp. 9588-9 and 9590, and appellant's main brief, pp. 833-4.) It is impossible if his last position be true, that he did not know it when he filed his answer.

He will not be credited at all, or allowed to change his position under such circumstances.

> *Henderson* v. *Louisville, etc., R. R.*, 123 U. S., 64-5.
> *The Santessima Trinidad*, 7 Wheat., 339.

If Carter is held to the allegations of his sworn answer to the bill, it utterly destroys his whole accounting and defense based upon his wife's alleged estate and diary entries.

The Court Martial of Carter.

The bill charges (Vol. 1, p. 34) that following the Board of Inquiry a Court Martial was convened at Savannah on January 12, 1898, of which General Elwell S. Otis was president. That after a trial (which lasted about three months) Carter was convicted and sentenced to dismissal from the army, to pay a fine of $5,000 and to be imprisoned at hard labor for five years.

That the case was referred to the Attorney-General, Mr. Griggs, by the President, and on report of the latter reviewing the case the sentence was affirmed September 29, 1899. That after some abortive efforts made by Carter for release on habeas corpus, Carter was imprisoned in Ft. Leavenworth, Kansas, penitentiary. (He was placed there April 27, 1900; Vol. 10, p. 4964.)

These allegations are not disputed. The review of the Court Martial trial by the Attorney-General is found in 22 Opinions Atty. Genl., p. 589.

The subsequent review on habeas corpus by the Supreme Court is found in

Carter v. *McClaughry*, 183 U. S., 365.

From which it will be seen that the conviction of Carter was for conspiracy to defraud the United States, for knowingly causing fraudulent claims to be made and presented to him as such officer for payment, and for embezzlement.

By a stipulation (Vol. 18, p. 8807-8) entered in the present case certain of the testimony taken before the Court Martial, was used in the present case.

The answer of O. M. Carter (Vol. 1, p. 134) admits his conviction by the Court Martial, but attempts to minimize the effect of it, by attacking the then Chief of Engineers, the members of the court and Capt. Gillette, his successor. He

also makes a misstatement of the gravity of the charges upon which he was convicted as will be seen from the decision of the Supreme Court above referred to. The answer (Vol. 1, p. 134) also states that "Hon. George F. Edmunds, to whom the matter was referred by the President and who spent two months considering the same, reported to the President that this defendant was not guilty and should be acquitted."

The evidence in regard to this Edmunds' review of the Court Martial evidence shows that the matter was not referred to him by the President. That his fee was paid by Carter, and shows that it was an extra-judicial *ex parte* report made possibly by permission of the then Secretary of War, Genl. Alger, at the request of Carter or his counsel, and was merely treated by the War Department in the nature of a brief for the defense. In this alleged report, however, which was admitted in evidence over the objection of complainants, Senator Edmunds found so many irregularities committed by Carter as to warrant his dismissal from the army and only found him not guilty of conspiracy and embezzlement, because he could not find that any part of the money from the contracts had been traced back to him, and therefore he could not find the motive to show that the irregularities resulting in exorbitant prices, were wilfully permitted. (See Main brief, p. 835.) In the present case the proof has been made that Carter, directly and indirectly, was a beneficiary of a third of the net profits, and the motive is supplied.

Indictment of Greene and the Gaynors—The Removal Proceedings.

The bill then charges (Vol. 1, p. 36) that Benjamin D. Greene, John F. Gaynor *et al.* were indicted in the Southern District of Georgia December 8, 1899, for conspiracy with Carter to defraud the United States, as substantially set forth in the charges in the present bill. That Greene and the Gay-

nors took refuge in New York City, where certain proceedings for their removal under Sec. 1014 R. S. were had and a large amount of testimony was taken before Commissioner John A. Shields during the year 1900, which finally resulted in a warrant for their removal. The bill further charges that Robert F. Westcott, who had declined to go before the Board of Inquiry to testify for or against Carter, and was absent in Europe during the Court Martial, returned to the United States, had expressed his willingness, his son-in-law being already in the penitentiary, to testify as against the other conspirators to the facts within his knowledge, and turn over to the Government all his checks, check books and documents bearing upon questions in issue.

It is averred that Robert F. Westcott did so testify before the Commissioner.

It was further charged that while the said hearing before the Commissioner was being proceeded with, the complainant's agents and attorneys, by great labor and strenuous efforts, were enabled through the greater effectiveness of the processes of the civil courts, to obtain a large amount of documentary and other evidence from banks, brokers and others, unknown to complainant until then demonstrating the division of the fruits of the said fraudulent scheme between the said conspirators as set forth in the bill.

The answer of O. M. Carter (Vol. 1, p. 137), simply denies knowledge of the removal proceedings except by hearsay.

At a subsequent stage of the proceedings, however, the testimony taken before Commissioner Shields with certain exceptions, was by stipulation (Vol. 18, p. 8807), admitted for use in the present case as if taken herein.

Carter's counsel, however, refused to agree to admit the testimony of R. F. Westcott so taken. Complainant offered a certified copy of it (Vol. 11, p. 5209-10), independently of that stipulation on the question of notice as hereinbefore re-

ferred to. It was stipulated further by defendants' counsel that the certified copy could be used without further proof of the deposition, if the testimony be admissible at all. (Vol. 18, p. 8848 and Vol. 11, p. 5209-10.) The objections of the defendant are found Vol. 14, p. 6304. The grounds of the admissibility of Westcott's deposition are stated *ante*, p. 19.

So far as this testimony of Westcott's is admissible to show it (Vol. 24, p. 11253-11301 and 11439-11816), it absolutely contradicts Carter's claims that the assets now in controversy were gifts from Robert F. Westcott.

Lorenzo D. Carter and I. Stanton Carter.

The bill then charges (Vol. 1, p. 39) that Lorenzo D. Carter and I. Stanton Carter, with full knowledge that O. M. Carter had no interest in any of the securities and investments in controversy, except such as he had acquired in pursuance of said scheme to defraud, did on or about the time of the confirmation of the Court Martial proceedings, join said conspiracy and agree with said Oberlin M. Carter to aid and abet him in holding and concealing from the complainant the assets into which the said Oberlin M. Carter had so diverted the funds intrusted to him as disbursing officer as aforesaid. It charges that in pursuance of said agreement on or about October 2, 1899, I. Stanton Carter accepted from O. M. Carter a power of attorney authorizing I. Stanton Carter to dispose of any of the aforesaid assets by and in the name and stead of said Oberlin M. Carter. That under this power certain deeds were made by which the legal title to the property hereinbefore referred to as the 8th avenue, New York, property and the Orange, N. J., property was put in Lorenzo D. Carter and I. Stanton Carter. It was further charged that Lorenzo D. Carter and I. Stanton Carter held the title to these properties in trust to account to the complainant for the same, and

to turn over, deliver and convey the same to complainants upon demand.

It was further charged (Vol. 1, p. 41) that I. Stanton Carter and L. D. Carter had been and were then collecting the rents from the aforesaid real estate, and that it was necessary for the protection of the interest of the complainant that a receiver be appointed to take charge of, hold and protect *pendente lite* all of the aforesaid properties in the jurisdiction of the court, and such other of the properties or proceeds thereof in the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as a disbursing officer have been so fraudulently diverted and invested as aforesaid.

Prayers of the Bill.

After the usual prayers for receiver, injunction, etc., the bill contained the following prayers (Vol. 1, p. 42):

> "(3) That the court will in due course by its final decree declare all of the aforesaid investments within the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as disbursing officer and so fraudulently diverted to his own use as aforesaid, in the hands of the defendants and of all persons holding the same for the benefit of said Oberlin M. Carter, or taking the same with notice of the fraud, are properties held in trust for orators and will decree a delivery *of the same or the proceeds thereof* to your orators, or a conveyance of the same to your orators, or a sale of the same, and the delivery of the proceeds to your orators as the nature of the case and justice may require."
>
> "(10) May it please your Honors to grant unto your orators, such other and further relief as the nature of their case may require and to the court may seem meet and appropriate."

Answer under oath was waived. (Vol. 1, p. 42.)

The Answers of I. Stanton Carter and L. D. Carter.

The first answer relative to the assets charged in the bill to be in his possession, was made by I. Stanton Carter in reply to a demand upon him made September 16, 1901, by the temporary receiver appointed in the cause. In this answer (Vol. 1, p. 97) I. Stanton Carter said:

> "None of the property mentioned in your demand is either in my possession or under my control, except one bond of the Michigan Telephone Co. for one thousand dollars ($1,000.00) and one bond of the Kentucky Central Railway Co. for one thousand dollars ($1,000). These bonds are my individual property, purchased entirely with my own private funds, and now belong and have always belonged to me solely and individually."

The demand of the receiver (Vol. 1, p. 96) was for the specific securities and assets, described in the bill or their proceeds, a large part of which, as will be presently pointed out were subsequently forced out of the possession and control of I. Stanton Carter and L. D. Carter.

The first answer of L. D. Carter to the receiver's said demand (Vol. 1, p. 98) was as follows:

> "None of the property mentioned in your demand is either in my possession or under my control. At one time some of that property was turned over to me under an agreement by which I was to use the property, or its proceeds in paying the expenses of the defense of Captain Oberlin M. Carter in the various proceedings brought against him by the United States and to indemnify me against any obligation which I might incur in such matters and to pay any expenses or obligations which I might incur in any proceedings brought by said Captain Oberlin M. Carter. All of the property which I have ever received has been disposed of and the proceeds applied for the above purposes prior to commencement of this suit."

On September 23, 1901, on the report by the receiver of these answers from I. Stanton Carter and L. D. Carter, to the court, complainant moved for a rule for contempt against

I. S. and L. D. Carter for failure to turn over assets to the receiver as had been previously ordered by the court. The rule was granted. (Vol. 1, p. 100.)

Answer of L. D. Carter to the Rule for Contempt.

On October 21, 1901 (Vol. 1, p. 112) L. D. Carter filed his answer to said rule for contempt for failure to turn over assets to the receiver, in which answer he repeats the previous allegations made to the receiver, and under oath adds:

> "This defendant again states that he has no money or property in his hands, or under his control belonging to Oberlin M. Carter or to the complainant, or mentioned or described in said bill of complaint."

Answer of I. Stanton Carter to the Rule for Contempt.

On October 21, 1901 (Vol. 1, pp. 115-117) I. Stanton Carter filed his answer to said rule for contempt, and under oath adds:

> "This defendant again states that he has no money or property in his hands or under his control belonging to Oberlin M. Carter, or to the complainant mentioned or described in said bill of complaint, except said two bonds aforesaid, which is his own individual property."

On October 28, 1901, when the hearing came up for a permanent receiver *pendente lite,* a stipulation was entered into and made the order of the court, by which Max H. Whitney was in effect continued as permanent receiver. (Vol. 1, p. 117.)

The Paul Receipt.

While the rule for contempt was on the calendar for hearing, complainant made a motion (Vol. 1, p. 118) for an order appointing a master to take off the accounts of Frank P.

Blair from certain banks in Chicago, which was resisted by the defendants. At the hearing on that motion October 28, 1901, complainant produced (Vol. 1, p. 247) the affidavit, dated October 5th, 1901, from J. H. Paul who had acted as O. M. Carter's agent in New York with the original receipt of May 23, 1900, attached in evidence as P. Exhibit 3, Booth (Vol. 10, pp. 4901-3) showing that on May 23, 1900, J. H. Paul had turned over to I. Stanton Carter and Ditson P. Carter securities described in the bill aggregating at par $349,475.

Certain Assets in Hands of Receivers in Other Districts.

Prior to November 6, 1901, the complainant had on auxiliary bills filed in other districts, tied up in the hands of receivers a large amount of the investments claimed to have been made by Carter with the trust funds.

In New York, under orders of July 30, 1901, and October 12 and 13, 1901, the 8th avenue, New York, property and certain securities. (See Vol. 19, pp. 9348-51-59, and receiver's report, Vol. 19, p. 9360.)

In New Jersey under orders of July 30, 1901, and October 14, 1901, the Orange, New Jersey, property (see Vol. 19, p. 9402-3, and receiver's report, Vol. 19, p. 9404).

In West Virginia under order of August 31, 1901, a large amount, $196,282.08 of the securities and cash proceeds thereof, from the custody of Ditson P. Carter, which constituted a part of the $349,475 of securities listed on the aforesaid joint receipt of May 23, 1900, given by I. S. Carter and Ditson P. Carter to J. H. Paul. (See Vol. 19, pp. 9447-8, and receiver's report, Vol. 28, Exh. 432, and Vol. 29, Exh. 450.)

In Georgia, under orders of August 10, 1901, certain assets in the hands of Mackall & Anderson were tied up by restraining order. (Vol. 19, p. 9493.)

The Agreement of November 6, 1901.

Upon the exhibition of that receipt given to J. H. Paul, opposition to the motion was withdrawn, and Mr. F. P. Blair opened up his accounts, which were put in evidence later. (Vol. 10, p. 4957.) The defendants then being apprised that complainants had gotten into possession of indisputable documentary evidence tracing the possession of some $349,475 of the assets in question into the possession of I. Stanton Carter, and being put in a position where they were shown to be in contempt of court and certainly where they could be forced to disgorge the assets withheld from the receiver then entered into the agreement of November 6, 1901. (Vol. 1, p. 119.)

After referring to the pendency of the auxiliary bills, the first clause of this agreement provided:

> "(1) The issue as between the United States and Oberlin M. Carter as to the fraudulent diversion of funds, intrusted to him as a disbursing officer, into the assets as charged in complainant's bills pending in the several districts, shall be brought to final decree first in the Circuit Court of the United States for the Northern District of Illinois, and the final decree of that court, unless reversed by the appropriate appellate court on appeal shall be conclusive on all questions determined therein, and shall be made effective by appropriate decrees on the bills in the other districts if deemed necessary by either party.
>
> But this clause shall not be construed to operate to the prejudice or delay of the Government in any proceeding against other parties for accounting in districts other than the Northern District of Illinois, who may be claiming for themselves any part of said assets."

The clauses of this agreement affecting the question of the delivery of the assets claimed by the Government in its bill, which were to be delivered by I. Stanton and L. D. Carter, were as follows:

> "(2) That as to the assets claimed by the Government as assets into which it charges the funds intrusted to

Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income, and re-investments thereof where the form of the investments have been changed, and which assets have or may be hereafter traced in the possession, custody or control of said defendants, and have not heretofore been *bona fide* disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond charged in the bill to be re-investments of said alleged trust fund, and which bonds are claimed by I. Stanton Carter, should be held by the receiver pending the litigation."

"(4) L. D. Carter and I. Stanton Carter will forthwith dismiss their demurrers and file answers *disclaiming any personal interest in the aforesaid assets* in controversy in this litigation, including the real estate on 8th avenue, New York, and at Orange, New Jersey, except as to the two bonds claimed by I. S. Carter as above."

There are other clauses of the agreement, not necessary to be considered in this connection. Among others, certain allowances were to be made by the court out of the fund to be turned to the receiver to enable Oberlin M. Carter to make his defense. But the said allowances were to be made:

"Upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter, and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and re-investments, except such as has been, prior to the receivership, *bona fide* paid out or pledged by them for attorneys' fees or as expenses in defense of Carter or expended by them legitimately in the handling of said properties, or which has not already been taken possession of by receivers in this cause."

Surrender of Assets.

Following this agreement I. Stanton Carter delivered to Max H. Whitney, receiver, November 11, 1901, assets only

aggregating at par value $71,660 (Vol. 1, pp. 297-8), of which $60,000 were bonds listed on the receipt to J. H. Paul given by I. Stanton Carter May 23, 1900.

The Answers Filed to the Bill by I. S. and L. D. Carter.

On February 1, 1902 (Vol. 1, p. 141), I. Stanton Carter filed his answer to the bill, in which he set up that he had agreed with complainant, since the filing of the bill, to account for all the assets claimed by O. M. Carter, which ever came into his hands and that he had done it. He did not disclaim any personal interest in the assets claimed by the Government in the bill as provided in the agreement. Instead, as will presently be seen he set up claims for personal salary, etc., and has to this time vigorously contested for the same, as a set-off for assets not surrendered to the receiver.

On February 1, 1902 (Vol. 1, p. 139), L. D. Carter filed his answer to the bill, in which he set up that:

> "This defendant admits and alleges that at the request of said Oberlin M. Carter, he assisted said Oberlin M. Carter in this effort to defend himself and to obtain justice and that in so doing he received certain money and property from said Oberlin M. Carter, and paid it all out on behalf of said Oberlin M. Carter, and accounted to him for all of the same and all of this defendant's said acts and doings were then and there approved and ratified by said Oberlin M. Carter."

He fails in his answer to disclaim all personal interest in the assets in controversy, confining his disclaimer to the 8th avenue, New York, property and Orange, New Jersey, property.

As to the 21M Kentucky Central bonds, which are claimed by the complainant in the bill (see Vol. 1, p. 31), he not only

fails to disclaim as he was bound to do under the stipulation of November 6, 1901, but says:

> "This defendant admits that he has not turned over to the receiver appointed herein twenty-one Kentucky Central bonds of $1,000.00 each described in said bill of complaint, because the said bonds belong to him personally, as he paid out his own money on behalf of said Oberlin M. Carter to the value of said bonds as payment thereof, and has accounted under said agreement with the complainant with regard to said disbursements."

As matter of fact no such accounting to the complainant or to the receiver had been made.

As will presently appear L. D. Carter was forced to turn over these 21 Kentucky Central bonds to the receiver after vigorous contest before the master and before the court.

As will presently be seen both I. S. and L. D. Carter fell far short of accounting for the assets traced into their hands.

The Reference to W. M. Booth, Master.

The complainant being dissatisfied with the accounting which I. S. Carter and L. D. Carter had made to the receiver for assets traced into their hands, on October 15, 1902, obtained an order of reference to W. M. Booth, master. (Vol. 1, p. 148.)

The master was required to take evidence and report on the following points:

> "(1) What assets or proceeds thereof, or re-investments thereof, charged by the complainant to have been a part of the trust funds diverted by O. M. Carter, and in the possession, power or control of I. Stanton Carter, and Lorenzo D. Carter on the date of notice to them of the appointment of Max H. Whitney, receiver, or since then coming into the hands of either of them, if any, is yet properly to be accounted for to the receiver and yet to be turned over to the receiver by them and either of them respectively, under the orders of the court in the

premises and the terms of the agreement of November 6, 1901, approved by this court on that date."

"(2) Whether said Lorenzo D. Carter and I. Stanton Carter have turned over to the receiver herein 'Substantially all of the assets turned over to I. Stanton Carter and L. D. Carter by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and re-investments, except such as has been prior to the receivership *bona fide* paid out or pledged by them for attorneys' fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession of by receivers in this cause.' And if any thereof has not been turned over, or properly accounted for by them, or either of them, respectively, then to report what has not been so accounted for."

Report of Booth, Master.

In the hearing before Special Master W. M. Booth on this reference, the defendants I. S. and L. D. Carter were represented by Mr. H. G. Stone, the chief counsel for O. M. Carter and for them.

In order to make a set-off against a large part of the said trust assets which the master found traced into their hands and converted into money, and which they had not paid out, or delivered up to the receiver, I. Stanton Carter made a claim against the assets in his hands of $7,500 for salary alleged to be due him by O. M. Carter for 25 months (Vol. 10, pp. 5035-5038) and L. D. Carter made a claim against the assets in his hands of $15,000 for salary alleged to be due him by O. M. Carter for 18 months. (Deft. Exh. 5, Booth, Vol. 10, pp. 4989-90.)

They also claimed credit for large expenditures from the fund traced into their hands, which the master found they had not paid out.

But notwithstanding the evidence showed that I. S. Carter and L. D. Carter took these assets in charge with full notice of the Government's claim thereto, and notwithstanding the clause of the agreement of November 6, 1901, which provided that I. S. Carter and L. D. Carter were to file answers "disclaiming any personal interest in the aforesaid assets in controversy in this litigation," the report of the master (Vol. 10, pp. 5052-5056) allowed I. Stanton Carter to set-off against the aforesaid trust fund in his hands as salary for 22½ months $6,750 and (Vol. 10, pp. 5067-8) and allowed L. D. Carter to set-off against the aforesaid trust fund in his hands as salary for 15½ months $12,916.66.

These salary allowance as well as certain credits given I. S. and L. D. Carter for alleged expenditures were excepted to by complainant, and by reason of the failure of the court to fully correct them, they formed the basis of appellant's assignments of error numbered 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 on the appeal to the Circuit Court of Appeals. There was no dispute between the parties before the master as to the debit items of the account of I. S. and L. D. Carter for assets claimed by the Government as trust funds which went into their hands. (See report of Booth, Vol. 10, pp. 5042, 5047 and 5068.) The differences arise from the amounts for which they claim credit. The master required L. D. Carter to turn over 10 out of the 21 Kentucky Central bonds to the receiver, but he allowed L. D. Carter to retain 11 Kentucky Central bonds as a balance due him from Carter on salary. (Vol. 10, p. 5071.)

L. D. Carter turned over the 10 Kentucky Central bonds to the receiver in compliance with the report of the master, March 13, 1903. (Vol. 1, p. 299.)

The master found that I. Stanton Carter was short $13,471.19 in money arising from the trust fund for which he had made no proper accounting (Vol. 10, p. 5057), besides the one

Michigan Telephone bond and one Kentucky Central bond, which the master found had been purchased with the trust fund. (Vol. 10, p. 5057.)

Interlocutory Decree on Exceptions to Master's Report.

Exceptions to the master's report were filed by complainant (Vol. 1, p. 318), and by defendants (Vol. 1, p. 353).

After a hearing on the exceptions the court rendered an interlocutory decree on January 7, 1904. (Vol. 1, p. 150.) By this interlocutory decree it was provided:

> "(1) That so much of said master's report as allows salaries as such to I. Stanton Carter and Lorenzo D. Carter and sets the same off against the assets for which they are accountable to the receiver, be and the same is hereby set aside. The question of the right of the said defendants to set up said claims for salaries as against the funds turned over to the receiver, or for which they may be held accountable, being hereby reserved for the hearing on final decree with the other issues on the merits of the main controversy between the United States and the defendants, O. M. Carter, I. S. Carter and L. D. Carter."

This interlocutory decree further directed the turning over to the receiver by I. S. Carter of the one Michigan Telephone bond, and the one Kentucky Central bond withheld by him, and the turning over to the receiver by L. D. Carter of the 11 Kentucky Central bonds which he had withheld up to this time. These bonds were turned over to the receiver on January 8 and 13, 1904. (Vol. 1, pp. 305-6.)

The said interlocutory decree further provided (Vol. 10, p. 151):

> "(3) It is further ordered and decreed that when I. Stanton Carter and Lorenzo D. Carter shall have complied with the foregoing provisions of this decree, that they shall have sufficiently accounted to the receiver *as far as they should be required on this interlocutory proceeding* for the assets remaining in their hands, to put in operation clauses one (1), seven (7) and eight (8) of the agreement of November 6, 1901.

(4) The questions raised on the exceptions of the United States to alleged excess expenses allowed by the master to I. S. Carter and L. D. Carter, and exceptions to the alleged excess of credit allowed by the master to L. D. Carter for amounts claimed as paid to J. H. Winkler, and exceptions as to the liability to the United States of I. S. Carter and L. D. Carter to account for assets in controversy traced into their hands and which they claimed before the master not then to have, as well as the questions raised by the exceptions of defendants to certain items charged by the master to them, and to certain items of credits which they claim in their exceptions that the master should have given them in stating their account, and the proper restatement of said account, are all not finally passed on herein, but are reserved for the decree of the court on the merits of the cause on final hearing, and further argument of counsel, with leave to either party to take and offer additional evidence."

Among the exceptions filed by complainants to the master's report, which by the terms of this interlocutory decree were not finally passed on, but reserved for final decree, were exceptions which if sustained would show that I. Stanton and L. D. Carter had in their hands unaccounted for at the date of the interlocutory decree of January 7, 1904, $41,269.75 of the proceeds of trust assets in controversy converted into money (Vol. 10, pp. 347-349) and after the delivery of the 13 bonds which they were required to deliver by that decree they would be still short $30,192.16 in their accounting to the receiver.

And the same exceptions (Vol. 10, p. 350), if sustained, would show that $21,288.04 of said $41,269.75 not accounted for by L. D. and I. S. Carter were from the assets received by them from Paul, Westcott and Bragg. And by the terms of said agreement of November 6, 1901, the right of Carter to have the allowances for his defense was dependent upon the delivery by I. S. and L. D. Carter of substantially all the assets received from Paul, Westcott and Bragg. (Vol. 1, p. 121.)

THE MAIN ISSUES ON THE MERITS IN THE CIRCUIT COURT AND CIRCUIT COURT OF APPEALS.

(1) Was O. M. Carter in fraudulent conspiracy with Benjamin D. Greene, John F. Gaynor *et al.*, in respect to the Government contracts and contract work as charged in the bill?

(2) Were the profits and fruits of the Greene and Gaynor Government contracts during the period in question, fraudulent profits, paid out by O. M. Carter, so that they could be recovered by the Government as a trust fund fraudulently diverted, from all persons holding the same for Greene, Gaynor or Carter, or taking the same with notice of the fraud?

(3) Was the evidence sufficient to trace each of the investments or proceeds thereof claimed by the Government on the one hand and by O. M. Carter on the other, as derived from the profits and fruits of the said Government contracts?

(4) Where other defendants, holding for O. M. Carter such assets derived from the profits and fruits of said contracts, or taking the same with notice of the Government's claim thereon, have converted such assets into money and failed to account for the same, are the complainants entitled to a money judgment therefor?

(5) Where a part of such said assets traced as investments from the profits and fruits of the said contracts, have been by O. M. Carter dissipated or otherwise applied to his own purposes, are the complainants entitled to a money judgment against O. M. Carter for the value of the assets so dissipated?

(6) Were the defendants I. S. and L. D. Carter entitled to set-off against the trust assets retained by them salaries claimed to be due them by O. M. Carter?

HOW THE ISSUES WERE DECIDED.

(1) Carter's Guilty Participation in the Frauds.

(Circuit Court of Appeals.)

The finding of the Circuit Court of Appeals in its opinion and decree (Rec. Vol. 33, p. 13426) was as follows:

> "Under the settled facts recited however, linked with cumulative evidence, tending to prove actual knowledge on the part of Captain Carter of the excessive profits in the mattress work and the divisions thereof with Westcott in New York, and complicity in the fraudulent transactions, of which (at one time and another) he acquired approximately one-third of the net proceeds we are constrained to the belief, that the evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Captain Carter."

This is a finding of fact, based upon a review of all the evidence in the case.

(Circuit Court.)

Judge Kohlsaat, in his opinion after reciting that the engineering features of the case considered by themselves would not be sufficient to warrant the conclusion of Carter's guilt, takes up in connection therewith, the proof that the exorbitant profits of the contracts had been divided by thirds as they accrued, and that Carter was shown to have been the beneficiary of one of the thirds for a period of five years, said (Rec. Vol. 1, p. 382):

> "But when all these considerations are borne in mind and given due weight, it is still beyond controversy from the record that a great wrong was practiced upon the Government by the contractors. The evidence to be found in the record with regard to the financial transactions of Carter, Westcott, and the contractors, Greene

and Gaynor, is both vast and intricate and entirely circumstantial. It has been read and reread by the court as presented by the briefs and depositions. To recite it here is of no value. Suffice it to say that without passing *directly* upon the questions as to whether Carter had actual knowledge of, and connived at this raid upon the Government, *the facts brought out concerning these financial transactions are such that he must, as a conclusion of law be held chargeable with knowledge of what was being done in the premises.* This fact alone makes it clear that the Government is entitled to a decree awarding to it each and every of said pieces of property held by the receiver, which shall be found to have been purchased, directly or indirectly, with moneys received by Westcott, or anyone else, or in any way arising from funds made up of profits realized by the contractors under the contracts in suit. And it will be so ordered."

The above language used by Judge Kohlsaat is not free from ambiguity.

It is difficult to determine whether Judge Kohlsaat intended by that language to make a finding that Carter was, guilty of actual participation in the frauds of the contractors which he found to be proved, or was simply charged with constructive notice of the frauds.

It was for that reason complainants assigned error in its appeal to the Circuit Court of Appeals for the failure of Judge Kohlsaat to make his finding definite, which was answered by the definite pronouncement of Carter's guilty participation by the Circuit Court of Appeals.

Since the decree of the Circuit Court of Appeals however, Judge Kohlsaat has filed an answer to the petition of the United States, filed in this court, for prohibition and stay in this cause, in which answer the judge says:

> "He also admits that said cause was appealed to the Circuit Court of Appeals for said circuit and was there substantially affirmed."

From this answer it would seem that the judge himself considers that the findings of the Circuit Court of Appeals

of Carter's guilty participation in the frauds was merely confirmation of what he himself had found.

After all, his conclusion that:

> "The facts brought out concerning these financial transactions are such, that he must as a conclusion of law be held chargeable with knowledge of what was being done in the premises"

is a finding of the ultimate fact of guilty participation in the frauds by Carter, by the application of legal presumptions to the facts found.

Precisely that conclusion of law arises from the facts as found.

Tiedeman on Equity Jur., Sec. 235.
Eaton on Equity, Sec. 135.

We insist therefore that the question of Carter's guilty participation with the contractors in the frauds, has been settled affirmatively as a finding of fact by both the Circuit Court of Appeals and Circuit Court, and that under the rules established by this court the question is not reviewable in this court on a mere conflict of evidence.

The fundamental question of the guilt of Oberlin M. Carter of conspiracy and fraud with Benjamin D. Greene and John F. Gaynor, which is the basis of the right of the Government to recover the assets claimed as investments of the diverted trust funds, and awarded to the United States by the Circuit Court of Appeals, has also been passed upon affirmatively heretofore by numerous courts, notably in the following proceedings:

Verdict of guilty by general court-martial. Reviewed by Attorney-General Griggs and affirmed by President McKinley September 29, 1899. See *Carter Case* (22 Opin. Atty. Gen., p. 589.)

Reviewed by the Supreme Court of the United States and sentence affirmed on habeas corpus. *Carter* v. *McClaughry* (183 U. S., 365).

Trial of Benjamin D. Greene and John F. Gaynor on indictment for conspiracy and fraud, with Oberlin M. Carter. Verdict of guilty, April 12, 1906, in the United States District Court, Southern District of Georgia. *United States* v. *Greene et al.* (146 F. R., 803).

Reviewed and affirmed by Circuit Court of Appeals, Fifth Circuit. *Greene et al.* v. *United States* (154 F. R., 401, 414).

In that case that court said:

> "Our examination of the case has extended to all points presented in briefs and arguments, without regard to the time when the exceptions were taken, with the view of seeing that no injustice was done the defendants. We find nothing in the record to show that the result of the trial in the court below led to an unjust verdict or judgment, or that an error was committed that would make it our duty to reverse the judgment."

Petition of Greene and Gaynor for *certiorari* from the above denied by United States Supreme Court. *Greene et al.* v. *United States* (207 U. S., 596).

> "As the Circuit Court and Circuit Court of Appeals agreed as to what were the ultimate facts established by the evidence, this court should accept their view as to the facts unless it clearly appeared that they erred as to the effect of the evidence."
>
> *Stuart* v. *Hoyden*, 169 U. S., 1, 14.

> "And when the evidence is conflicting, there being evidence to sustain the decree, this court will not ordinarily interfere."
>
> *Smith* v. *Burnett*, 173 U. S., 430, 436.

"It is the settled doctrine of this court that the concurrent decisions of two courts upon the question of fact will be followed unless shown to be clearly erroneous."

Brainard v. *Buck*, 184 U. S., 105.
Baker v. *Cumming*, 169 U. S., 189.
Towson v. *Moore*, 173 U. S., 17.
Sabine v. *The Richmond*, 103 U. S., 540.
Dravo v. *Fabel*, 132 U. S., 487.

The Evidence of Carter's Guilt.

Notwithstanding these principles applicable to Carter's cross-appeal, counsel for the United States calls attention to "Main Analytical Brief of the Evidence" filed in this court on part of cross-appellees, showing in detail the frauds committed in the engineering work done under the contracts in controversy, and showing in detail the divisions made of the fruits or profits of the contracts, between Greene, Gaynor and Carter.

In this connection attention is also called to "Certain Engineering Features of the Case" later set out in this condensed brief, in which in a condensed form some of the principal means by which the immense profits of the contracts were fraudulently created, are shown. Some idea of the exorbitant character of these profits created by the perverted exercise of the discretion claimed by Carter to have been innocently exercised may be had by referring to Main Brief, p. 512c, where it is shown as follows:

"Total payments to the said contractors from Sept. 16, 1892, to May 12, 1896.....$2,567,493.48
Substract profits divided between Greene, Gaynor and the third person in New York as above 1,815,941.62

Amount received by the contractors not divided as profits in thirds.....$ 751,551.86"

It also is there shown that $38,718.33 of the said sum $751,-551.86 represented sums paid to the younger Gaynors, who were co-conspirators and did not represent money spent on the work, leaving the maximum cost of the work to the contractors, but $712,833.53 added to the original cost of their plant $26,932.50.

(2) All the Fruits of Contract Fraudulent.

(Circuit Court)

In the decree of March 20, 1908, entered in the Circuit Court (Rec., Vol. 1, p. 389) by Judge Kohlsaat, paragraph (1) makes the following finding:

> "That all moneys in any way arising from the profits realized by the contractors under the River and Harbor contracts described in the bill and auxiliary bills in this case, constitute a trust fund, and that all of the same, with the investments, proceeds, re-investments and income thereof constitutes a trust fund which in equity and good conscience is for the benefit of and belongs to the complainant, and that no part of said money so arising, or the investments, proceeds, re-investments, or income thereof, can be held by the defendant, Oberlin M. Caretr, as against the complainant, or by any one not a *bona fide* purchaser for value without notice holding under or through Robert F. Westcott or Oberlin M. Carter."

This finding was affirmed by the Circuit Court of Appeals (Rec., Vol. 33, p. 13427 and 13432).

Indeed it follows as a corollary to the finding of the frauds committed by Greene, Gaynor and Carter under the contracts.

(3) As to Tracing of the Assets in Controversy from the Fraudulent Profits of the Contracts.

Position Taken by Defendants in the Circuit Court.

In his answer to the bill filed February 1, 1902, O. M. Carter (Vol. 1, pp. 131 and 136) O. M. Carter denied that he had ever received any interest or beneficial advantage from the aforesaid contracts, *directly or indirectly.* He therein stated (Vol. 1, pp. 131-132-136) that he never had any property in excess of $10,000 except such as were gifts from Robert F. Westcott, and that the large amount of assets which Carter now claims were derived from R. F. Westcott as such gifts from Westcott's private funds.

A great effort was made by the defense by the testimony of expert accountants and otherwise to sustain the position that the source of these alleged gifts from Westcott, was not the jetty contracts as charged.

Change of Position.

The case was on trial on the merits before Judge Kohlsaat from September 18, to October 2, 1906, (Vol. 1, pp. 159-163), and the proof of the fact that the bulk of these investments did come from the contracts was so overwhelming that counsel for defendants changed their position.

The Position Taken by Carter's Counsel as to What the Evidence Shows Was Westcott's Relation to Greene & Gaynor:

Mr. Sears' position:

In his argument at the final hearing in this cause reviewing the evidence, Mr. Sears of counsel for Captain Carter said (stenographic report of argument, pp. 959-60):

> "What is the true story of the Carter case, excluding all the manufactured and artificial coincidences? Take only the reasonable coincidences, take only the reasonable suspicions, and what is the true story of the Carter case?"

Then after referring to the big contracts of 1892, he said:

> "Greene and Gaynor got the contract, and Robert F. Westcott was their partner."

Mr. Stone's position:

The position taken in argument by Mr. Stone, chief counsel of Capt. in Carter, was as follows (stenographic report of argument, p. 402):

> "The Court: What is your attitude as to the relation of Greene and Gaynor in these matters? Do you admit that Westcott was a partner or in any way interested in these matters?
>
> Mr. Stone: Our attitude on that is this way, your Honor, it may be alternative. We claim that there is absolutely no evidence that can be called evidence in this way, that Westcott was a partner with Greene and Gaynor; at the same time there are these coincidences that Westcott did receive and deposit money at times Greene and Gaynor paid it out, and as I have said to Carter, I never try a case on a volcano, and that is true in this case. It may be that Westcott unknown to Carter, had some sort of partnership with Greene and Gaynor, but unknown to Carter."

After the arguments were concluded Mr. Stone, the chief counsel for Captain Carter, in his written statement filed with

the court as his request for findings, took the position that the evidence showed that Westcott had been Greene and Gaynor's partner for four years from 1892 to 1896, but not a partner on Carter's behalf, and that Carter did not know of that relation. In his written statement, page 71, Mr. Stone said:

> "The only tangible fact to support Johnson's claim that Westcott's partnership with Greene and Gaynor was on Carter's behalf is the fact that from four years after Westcott became a partner, *i. e.*, in October, 1897, he gave to Carter all that he, Westcott, had left on hand out of what he had received out of that partnership and on the next day Westcott left for Europe."

It is not the position of the Government that Westcott was the partner, but that O. M. Carter was, and that the evidence shows only that Westcott acted as Carter's agent in handling some of the assets, and that Westcott's name was used by Carter to cover up Carter's own acts.

Westcott's Connection—The Government's Contention.

There was not one witness who testified that Westcott was a partner with Greene and Gaynor.

Benjamin D. Greene, whose testimony was put in as a witness for Capt. Carter, testified (Rec., Vol. 2, p. 883):

> "Q. Has R. F. Westcott, within your knowledge, ever derived any profit from any Government contract in which you were interested?
>
> A. He has not nor from any other contract in which I have been interested and there were a good many besides Government contracts."

The Government's proof from the documentary evidence shows that R. F. Westcott did not retain a dollar of the income from the investments by him (or in his name by Carter) made with the third of divisions of the Government contract money, which was divided between September, 1892, to October 29, 1897, but that Carter enjoyed the entire income from

the beginning. That Carter handled himself $62,654.19 of the income from these securities: That while Westcott collected but $13,867.50 of said income, and he accounted to Carter for every dollar of it from time to time as the collections were made. (See Summary Table Main Brief, p. 816.)

It is also shown that the securities themselves purchased with the third of the said contract profits were frequently kept during the period of the frauds in a safe deposit box in New York in the common name of O. M. Carter and R. F. Westcott. (See Main Brief, p. 821-822.) That Carter had possession of all of said securities in August, 1897, just before he left for Europe. (See Main Brief, p. 823.) That on Carter's return from Europe, September 10, 1897, at the commencement of the Board of Inquiry proceedings against him, he delivered the securities to Greene and Gaynor, who then turned them over to R. F. Westcott. (Main Brief, p. 824.) That R. F. Westcott redelivered the securities to Carter, taking the receipts therefor of Oct. 11 and 29th, 1897. (Main Brief, p. 825-827.)

R. F. Westcott was over 70 years old and had been retired from business several years prior to 1891, when these frauds are charged to have been commenced. (Rec., Vol. 7, p. 3290), (and Rec., Vol. 7, p. 6586), (and Rec., Vol. 8, p. 4061).

Carter's wife (the daughter of R. F. Westcott) died Dec. 7, 1892. (Main Brief, p. 41), which was prior to the commencement of the divisions by thirds.

That the documentary evidence shows the proceeds of the first divisions by thirds of the illegal profits of the contracts went directly to Carter's personal credit. (See Main Brief, pp. 561, 601, 605, 611.)

That while subsequently deposits were made to the credit of accounts kept in the name of R. F. Westcott, most of them were made while R. F. Westcott was absent in Europe and

Carter controlled said accounts under a power of attorney, or were made by Carter personally.

R. F. Westcott was in Europe from January 29, 1895, and did not return until May 11, 1896. (Main Brief, pp. 759-760) during which time eight divisions of the Greene & Gaynor profits were made and the proceeds went in the R. F. Westcott accounts controlled exclusively by Carter and into Carter's own accounts.

It was impossible for Carter not to have known the source of the currency deposits aggregating $113,827.08 which went regularly into that Westcott account and into Carter's personal account at the dates of these Greene and Gaynor divisions, during the year and a half Westcott was in Europe and Carter was in sole control of the account.

From these considerations we contend that Carter was the beneficial partner with Greene and Gaynor and that Westcott was simply Carter's agent in making certain investments, and making certain collections of coupons and rents for him, but for which he fully accounted to Carter.

It is immaterial to a correct determination of this case to determine whether Westcott was an innocent agent of Carter or whether he had a guilty knowledge of the source of Carter's money, a portion of which he invested for Carter.

The Circuit Court of Appeals held (Rec., Vol. 33, p. 13427):

> "As the evidence further establishes, not only personal and business intimacy between Captain Carter and these contractors, but his constant presence with them in New York, upon the monthly visits to settle accounts and divide the proceeds between the contractors and Westcott as above stated, together with the cogent fact that Carter acquired the share of the illicit profits turned over to Westcott, we believe the inference of fact to be inevitable, that Captain Carter connived with these parties in thus defrauding the United States. The question whether the relation of Westcott in these divisions was one of partnership in the contracts (as stated in the opin-

ion below and contended in the argument of counsel for Carter on these appeals) or was that of a mere representative of Carter therein (as counsel for the government contends), may not be clear under the testimony; but neither contention requires discussion or solution under the foregoing view, for the reason that Carter is equally subject to the relief sought in this bill, whatever may be the actual relation of Westcott to either of such parties in the transactions."

(4) Differences between the Circuit Court of Appeals and Circuit Court as to which part of the Assets in hands of the Receivers are traced from the Trust Funds.

By reason of the fact that the assets tied up in the hands of the receivers in the six different jurisdictions, in which the bills were pending, were claimed to be a part of the original investments made by O. M. Carter or by R. F. Westcott, as the case may be, with the illegal profits of the Government contracts, or constituted reinvestments of the proceeds thereof, or income therefrom and by the reason of the fact that the income from all of said assets even those located in other districts had been collected and concentrated for some time in the hands of O. M. Carter's agents in Chicago, "the issue as between the United States and Oberlin M. Carter as to the fraudulent diversion of funds, intrusted to him as disbursing officer, into the assets as charged in complainants' bills pending in the several districts" was a common issue, in each of the bills, and the trial of one of the cases, particularly the Chicago case, involved the tracing of all the assets, including those situated in the other districts, and the determination of the property right therein.

The Chicago case was by the stipulation of Nov. 6, 1901, (Rec., Vol. 1, p. 119), made the test case.

The total assets brought into the hands of the receivers in the several districts were as follows:

In the Northern District of Illinois (Rec., Vol. 1, pp. 251-2)—
Securities of par value of $96,485, or cost value....$ 95,165.11
In the other districts—
Assets at par and cost value.....$315,302.35

Total $410,467.46

Finding of the Circuit Court on the Tracing.

The Circuit Court treated together the assets in the hands of the several receivers in its findings on the question of tracing. It found as follows:

By paragraph "(2)" of decree of March 21, 1908, (Rec., Vol. 1, p. 390) it decreed that assets in the hands of the several receivers, aggregating at cost and par values $37,114.75 were not traced as investments of the trust funds, and awarded the same to O. M. Carter free from all costs and charges of the litigation.

By paragraph "(3)" of the decree of March 21, 1908, it was decreed that all the balance of the assets in the several districts aggregating some $373,352.71 at cost and par values, had been traced as investments and proceeds of the trust fund and awarded the same to the United States, subject to certain allowances for expenses and attorneys' fees for the defense.

Finding of the Circuit Court of Appeals.

The Circuit Court of Appeals by its decree of March 18, 1909. Rec., Vol. 33, p. 13428),

After confirming the finding made by the Circuit Court in paragraph "(3)" that the $373,352.71 of assets in the hands of the receivers described in that paragraph, were property traced as part of the trust fund, then proceeded to find as follows:

> "Another provision of the decree, however, adjudicates that other securities and stocks, specified in a para-

graph marked '(2)' were 'not purchased with said trust fund, but with the private funds of Robert F. Westcott and Oberlin M. Carter,' and awards such residue to Captain Carter, as not subject to the trust. We believe this provision to be erroneous, irrespective of the contentions on behalf of the government, that these investments are otherwise fairly traced to the trust fund, either directly or indirectly, or by way of substitution in fact. Under the circumstances above recited, with the mass of investments coming to his hands (from whatever source) intermingled and secreted by Carter, asserting title as an entirety, we are of opinion that the elementary doctrine of equity requires, that his personal expenditures from the mass be made chargeable against any portion which may be his own; that he cannot be permitted (as sought through his testimony in this case) to segregate a portion from the residue, to be awarded to him as free from the trust, and thus impose the burden of all expenditures so made upon the trust fund; and that, for all purposes of the decree, all the property and securities (in custody) therein described, are within the trust, either as original or substitute investments, from the trust funds. So, the decree must be corrected in respect to such provision, and award title to the securities and stocks mentioned to the United States, without award of any part or portion to Carter."

It will be seen that the Circuit Court of Appeals did not find it necessary to go into the details of the tracing of the $37,114.75 of securities which had been held by the Circuit Court, not to be traced to the trust fund, any further than to see that the fund which had purchased them was a commingled fund composed, in part at least, of the trust fund (of which trust fund Carter was shown to have dissipated during the years 1892 to October, 1897, $70,802.88. See Exhibit 323, Vol. of Exhibits 29) (and of which trust fund Carter and further dissipated subsequent to October, 1897, and prior to the receivership, $105,019.66, as found by the Circuit Court of Appeals, Rec., Vol. 33, p. 13429).

Carter having falsely and fraudulently claimed the entire

fund, the court applied to him the principles announced by this court as applicable to such a case as follows:

> "It is a settled rule of this court, that if a party will attempt to impose upon this court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he shall not be entitled to restitution of that portion which he may ultimately establish as his own."
>
> The Dos-Hermanos, 5 Wheat, 76-96.

> "The manner in which the books of the Providence Company were kept renders such an account impossible as to the business done in their name.
>
> The conduct of the defendants in this respect has not been such as to commend them to the favor of a court of equity, under the circumstances, every doubt and difficulty should be resolved against them."
>
> *Rubber Co.* v. *Goodyear*, 9 Wall., 788, 803.

Carter kept no books of accounts, and the methods adopted by him of receiving the third of the profits from Greene and Gaynor by currency transfers of which $578,299.86 was traced directly and indirectly to him from 1891 to 1896 (see table Main Brief, p. 806) was a method of concealment. Of this amount the Government was able to tie up in the hands of the receivers, $373,352.71, which both Judge Kohlsaat and the Circuit Court of Appeals agree were traced beyond controversy to the trust fund, leaving $204,947.15 of these currency deposits unaccounted for unless it be represented in part by $37,114.75 of assets in the hands of receivers which Judge Kohlsaat held not to be sufficiently traced to the trust fund.

It is not surprising therefore that the Circuit Court of Appeals refused to consider in detail the contentions of Carter as to these $37,115.75 of assets being gifts to him from R. F. Westcott or derived by him from Carter's wife's alleged estate, when his claim that the $373,352.71 were also gifts from Westcott had been disproved.

Conflicts Also With Carter's Sworn Answer.

Moreover O. M. Carter had averred in his sworn answer filed February 1, 1902, (Rec., Vol. 1, p. 191), that:

> "This defendant denies that he ever at any time owned or claimed to own, either directly or indirectly or that any one else held for him in trust or otherwise, or that he ever possessed or held, except as agent for others, money, property and things of pecuniary value of $10,000 over and above what was given to him from time to time as a pure donation by his father-in-law, Robert F. Westcott."

And in the same answer Carter further had denied (Rec., Vol. 1, p. 136):

> "that any of the securities described in said receipts of October 11, 1897, and October 29, 1897, ever belonged to this defendant, or that he ever had any interest therein directly or indirectly until the same were respectively given to this defendant as a pure and original donation by said Westcott *at the time* of said *respective receipts* in October, 1897."

These were statements of fact, the truth of which were as much within Carter's knowledge then, as a contrary state of facts could have been within his knowledge thereafter.

Nevertheless after the Government closed its direct testimony on the tracing of the funds, Carter, supported alone by his own testimony and alleged diary entries purporting to have been made by himself, sought to establish the fact that Carter's wife, Westcott's daughter, who died in December, 1892, had been given $50,000 by R. F. Westcott in currency of which $36,600 was alleged by him to have been found after her death in the safety deposit box kept in her and Carter's name; and from which currency he claims some of the $37,114.75 of assets described in paragraph "(2)" of Judge Kohlsaat's decree were purchased, as well as part of those which are included in the $373,352.71 of assets which both

Judge Kohlsaat and the Circuit Court of Appeals held were beyond controversy purchased with the trust funds. Moreover Carter by his testimony and diary entries, set up the ownership by him of these securities aggregating $40,000 from May 2, 1893, and that the same had been so treated by Westcott and himself in repeated alleged settlements of the income therefrom made between them up to May 11, 1896. (See complainants' Main Brief treating of Carter's wife's alleged estate, pp. 626 to 629.)

Among the securities so claimed by Carter in his testimony as part of the investments of his wife's alleged estate claimed to have been so held by him from May 2, 1893, were the following securities described in paragraph "(2)" of Judge Kohlsaat's decree:

The 5 Ches. & Ohio 5% bonds which cost.....$5,275.00
The 5 Chi., St. P. M. & Omaha bonds which cost....$6,143.75
The 5 Chi., St. P. M. & Omaha bonds which cost....$6,106.25

and these being in addition to the other securities not included in paragraph "(2)" which brought up his claim of ownership as derived from his wife's alleged estate to $40,000 of the securities in controversy.

Not only were these 5 Ches. & Ohio 5% bonds and 10 Chi., St. P. M. & Omaha bonds included in the receipts given by O. M. Carter to R. F. Westcott in October, 1897, but in addition thereto 10 Morris & Essex 7s bonds and 5 Wabash, D. & Chic. 5s bonds, were all contended for in his testimony as part of the investments of his wife's alleged estate (see Main Brief, p. 833).

We thus see that by his testimony Carter set up a claim that he had owned in his own right from May 2, 1893, $30,000 of the securities, in the receipts of October, 1897, while in his answer filed January 1, 1902, prior to the closing of the Government's case on the tracing, he had sworn that he had never owned any of the said securities specified in the re-

ceipts, prior to October 1897 *at which time* he says they were given to him as original donations by R. F. Westcott.

Notwithstanding this Judge Kohlsaat awarded these 5 Ches. & Ohio bonds and 10 Chi., St. P. M. & Omaha bonds to Carter.

Carter Cannot Vary From His Sworn Answer.

Carter will not be allowed in a court of equity, to change by his testimony the position taken by him in his sworn answer previously filed, to make a defense inconsistent with the facts alleged in his answer where the facts averred in his answer are of such a character as to make them as well in his knowledge if true, at the time of his answer as afterward.

Even where a plaintiff offered to amend his petition under such circumstances, this court said that it was within the power of the court:

> "to treat the amendment as a mere addition to the original petition, and thus to preclude the plaintiff from contesting a material fact within her own knowledge, which she had once solemnly averred."
>
> *Henderson* v. *Louisville R. R.*, 123 U. S., 64, 65.

Much less can such a right of Carter to the securities be sustained under a variance of the proof offered totally inconsistent with his answer not amended.

Garland v. *Davis*, 4 How., 131, 148.

Boone v. *Chiles*, 10 Peters, 178, 179.

The Circuit Court of Appeals also had before it the fact that O. M. Carter had submitted to Attorney-General Griggs when the latter was reviewing the Court Martial record in 1898-1899, a written statement in Carter's own handwriting, setting forth that these securities which Carter now claims were part of his wife's alleged estate, and which he now

claims Westcott finally surrendered to him in October, 1897, were then (1898 and 1899) still the property of R. F. Westcott, and that the income therefrom which he was then collecting, was being collected for R. F. Westcott (see as to Carter's annotated account, Main Brief, p. 633).

The Circuit Court of Appeals also had before it the fact that Judge Kohlsaat had prior to his final decrees advanced out of the trust fund in the hands of the receiver $35,885.23 to O. M. Carter for his personal maintenance, for his counsel, and for his court expenses, during the pendency of the cause, for which Judge Kohlsaat had refused (Rec., Vol. 1, p. 407) to give complainants a judgment, and had refused to make the same a charge on the $37,114.75 assets awarded to Carter as not traced.

The $35,885.23 paid out for account of Carter was exclusive of the amounts paid for Receiver's compensation, and other general expenses of administration.

It was to this point, that the Circuit Court of Appeals addressed itself in the last part of its finding on this subject (Rec., Vol. 33, p. 33428) when it said as to Carter:

> "He cannot be permitted (as sought through his testimony in this case) to segregate a portion from the residue to be awarded to him as free from the trust, and thus impose the burden of all expenditures so made upon the trust fund."

Notwithstanding that the foregoing considerations are ample to show that the Circuit Court of Appeals was right in reversing Clause "(2)" of Judge Kohlsaat's decree of March 21, 1908, without going into a detailed consideration of the evidence which shows that the assets therein described were traced by the evidence as investments of the trust funds diverted by Captain Carter. We shall presently proceed to show that they are actually so traced by competent, sufficient and satisfactory evidence.

THE LAW AS TO TRACING TRUST FUNDS.

Mr. Pomeroy says:

"Trusts *ex Maleficio.* In general whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weekness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein, and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.

The forms and varieties of these trusts which are termed *ex maleficio* or *exdelicto,* are practically without limit.

The principle is applied wherever it is necessary for the obtaining of complete justice, *although the law* may *also* give the remedy of damages against the wrong doer."

2 Pomeroy's Eq. Jr., 2nd Ed., Sec. 1053.

See also—

Idem, Sec. 1051.

For many wrongs the plaintiff may have an election to so treat the transaction that his remedy may be at law or in equity according to the election of plaintiff.

This election belongs to the person wronged, not to the wrong doer.

One who has wrongfully converted the property of another into other property, cannot be heard to contend that the true owner cannot recover the property so acquired by the wrong doer in the exchange, but must be content with a suit for damages if the wrongdoer is solvent.

These various elections which the injured party may exercise, and the effect such election has on the remedy are well stated by Justice Swayne, in a case in which a bill in equity was sustained by the Supreme Court, after it had been dismissed by the lower court, and the Supreme Court sustained the right to recover assets in the jurisdiction and decreed an accounting in equity and gave in equity a money judgment for such part of the property as had been converted and which could not be reached in the jurisdiction.

May v. *Le Claire,* 11 Wall., 217.

> "Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested or to recover the money."
>
> *Smith* v. *Vodges,* 92 U. S., 186.

> "A court of equity has jurisdiction to reach property fraudulently acquired either in the hands of a wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust."
>
> *Moore* v. *Crawford,* 130 U. S., 122.

> "As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish which is his."
>
> *Nat. Bank* v. *Insurance Co.,* 104 U. S., 54.

"When a trustee mingles trust money with his own, the *right* and *lien* of the beneficiary attaches to this entire combined fund, as security for all that actually belongs to the trust estate."

2 Pomeroy's Eq., Sec. 1076, p. 1598.

"If he (the trustee) purchases land partly with his own money and partly with the trust money, the *cestui que trust* has clearly a *lien on the whole* estate for the amount of his fund."

Eaton on Eq., Sec. 210, p. 439.

"Where a trustee has abused his trust in the same manner, the *cestui que trust* has the *option* to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money."

May v. *Le Claire,* 11 Wall., 236.

"An application of the same principle which entitles the beneficial owner of a trust fund to claim all profits which the fiduciary has made by the use thereof, gives him the option, when the fiduciary has made an improper investment, of either adopting, and accepting such investment, if he should deem it for his interest to do so, or rejecting it and charging the fiduciary with the amount misapplied."

17 A. & E. Ency. Law, p. 475.

Oliver v. *Piatt,* 3 How., 333.

These principles apply as well where a trustee or bailee exchanges with himself the trust fund for other property or money of his own, as where the exchange is made with another person. The trust will attach to the property taken in exchange in either case.

Thus Church, Ch. Justice, said in the case of *Van Allen* v. *Amer. Nat. Bk.*, 52 N. Y., 1-5:

"Nor is it affected by the fact that the agent instead of depositing the identical moneys received by him on account of his principal, substituted other moneys therefor."

He illustrates the proposition thus:

> "A having $100, the proceeds of a sale of property of B, intends to place it in a repository and keep it for B, and instead of putting the identical bank bills in the designated place, substitutes others of the same amount and keeps them for B. As such proceeds, can there be any doubt that the $100 thus substituted would occupy the same position as the particular bills obtained for the property, with the same trust."

Cited and approved in:

Nat. Bk. v. *Inc. Co.*, 104 U. S., 70.

It was held in *Knatchbull* v. *Hallett*, 13 Ch. D., 696, that where a fiduciary has mixed a trust fund with his own in his bank account, and drawn out and dissipated a part of it, the rule attributing the first drawings out to the first payments into the account does not apply, there will be a conclusive presumption that he dissipated his own fund and the balance not dissipated will be held to be the trust fund.

Approved in:

Nat. Bk. v. *Ins. Co.*, 104 U. S., 68.

The foregoing authorities are sufficient, not only to show the equity jurisdiction over a bill to follow a trust fund, but the underlying principles controlling the rights of the parties.

Criticism of Complainant's Accountant.

It appears from the opinion of January 9, 1908, that Judge Kohlsaat had not then gone fully (Vol. 1, p. 382) into the details of the accounting by which the profits of the contracts had been traced into the assets held by Carter.

Nevertheless, in that opinion (Vol. 1, p. 380) he uses the following language already quoted:

> "In order to show a systematic course in payment to Westcott of approximately one-third of the profits accruing to Greene & Gaynor upon said contract work after 1892, as they were received by them, the Government's expert witness has in a number of instances forced balances and drawn strained conclusions, which might in a less conclusive showing throw suspicion upon all his evidence on the subject, but the coincidences tending to identify moneys paid to the contractors, with those in Westcott's bank accounts are, in the mind of the court, so conclusive, that the fact of such payments are beyond doubt as to a large number of the items."

It is submitted that in so far as the above may have been intended to discredit the testimony of Mr. Edward I. Johnson (the expert accountant, a national bank examiner who was detailed to this case, and who brought together and compiled in Exhibit 319 the documentary evidence, the juxtaposition of which in itself shows the divisions by thirds and Carter's beneficial interest therein) it is totally unjustified from anything in Mr. Johnson's testimony or in the compilation taken in connection with his testimony, and does Mr. Johnson great injustice.

It appears that the judge subsequently went more fully into this question of the divisions by thirds on the hearings had to settle the decree on February 21, 24 (Vol. 1, pp. 163-4), and in his opinion handed down March 17, 1908 (Vol. 1, p. 383), and in the decree of March 21, 1908 (Vol. 1, p. 389).

In this opinion and decree he holds that the investments indicated by Mr. Johnson's compilation, Exhibit 319, to have been derived from the Greene and Gaynor contracts covering 24 divisions of the profits, from division 8 to 31, inclusive, July 11, 1893, to May 12, 1896, must be conceded to have been so procured. (Vol. 1, p. 384.) He finds one exception in $5,000 of Wabash bonds only.

He then takes up the investments indicated by Mr. Johnson's compilation, Exhibit 319, to have been derived from the profits of the contracts in the first seven divisions, and holds (Vol. 1, p. 384) as to division "1" that "the coincidences" of withdrawals from Greene and Gaynor's bank accounts, and deposits in Carter's account at corresponding dates "are somewhat remarkable," but not sufficient to raise the presumption that the one was derived from the other.

He held (Vol. 1, p. 385) division "2" was proved. He held (Vol. 1, p. 386) that division "3" was proved. He held (Vol. 1, pp. 386-7) that division "4" was proved and investments to the extent of $7,000 were properly traced and $9,000 not traced.

He held (Vol. 1, p. 387) that division "5," the third $20,718.11 is traced only to the extent of $17,900 into Carter. But that is all which Exhibit 319 claims was so traced.

He held as to division "6" that the assets indicated in Exhibit 319 as traced to the investment of the $15,000 third was not traced.

He held that division "7" was proved.

In the entire review of the evidence, he could not refer to a single "forced balance" made in Johnson's statements.

The only things which he points out as being an unjustifiable entry is in division "6" where he says (Vol. 1, p. 388):

> "To make the figures come out right, the expert injects an item: 'unaccounted for, $100.00,' into some transaction of Westcott's of May 23, 1893."

The language quoted by the judge is taken from appellant's Main brief, p. 640, and for it complainant's counsel as well as Mr. Johnson are responsible, and we stand by it. It means just what it says, that in the deposit of $26,000 currency made by Westcott on May 23, 1893, we could by the evidence trace the source of $15,000 from a check cashed, we could trace $11,500 presumptively from that balance of the third, not till then deposited, and that the source of $100 of it was not shown by the evidence, *i. e.*, it was "unaccounted for."

Instead of being a "forced balance" it is a plain statement that the two things, viz.: the deposit of $26,600 and the sources of that money as indicated by the evidence did not balance by $100.

The Government only claimed $11,500 of that deposit as coming from division "6."

It is so stated in Exhibit E to the bill, sheet 4. (See Rec. Vol. 1, p. 59.) And it is so stated in Exhibit 319 of the evidence.

Counsel for defendants have tried to make it appear that because on these exhibits the expert put down only $11,500 out of the $26,600 deposit made on May 23, 1893, as being the deposit of trust money then made, that this was intended to mislead the court.

But this is preposterous, because just after putting in evidence Exhibit 319 before the examiner, Mr. Johnson's analysis of the financial transactions between Westcott and Carter was put in evidence as Complainant's Exhibit 590. (Vol. 29.) On this Exhibit 590, sheet 3:—

The entry is:

> "1893, May 23. Deposit of bills in the Union Trust Co., N. Y., $11,500.
> Being a part of a deposit of bills of $26,600."

It is submitted that the fact that the evidence placed in

juxtaposition on Exhibit 319 by Mr. Johnson in a few instances, are not deemed sufficient by the judge to raise the presumption that deposits of currency in Carter's account came from withdrawals of money at corresponding dates from Greene & Gaynor accounts, is not the fault of Mr. Johnson, or a reflection upon the conscientiousness of his work. He did not testify that the one came from the other. He put the documentary evidence of the facts before the court and left it to the court to decide.

It is submitted, however, that even in regard to the tracing of the assets in the few divisions which the Circuit Court found against the contention of complainant, that the judge committed error.

And that it has been so held by the Circuit Court of Appeals in their opinion and decree. (Rec. Vol. 33, p. 13428.)

We shall however presently consider in detail, the few instances of tracing the investments on which the Circuit Court of Appeals and Circuit Court differ.

PROOF OF THE DIVISIONS OF THE PROFITS. CARTER THE BENEFICIARY.

The proof of the divisions of the net profits of the jetty contracts *by thirds* commencing from contract 4820 of Sept. 16, 1892, and running through the other contracts to 1897, of which one-third went to Benjamin Greene, one-third to John F. Gaynor, and one-third directly or indirectly to Oberlin M. Carter is fully set forth in appellant's main brief, commencing at p. 560.

This was practically admitted by counsel for defendants in the final arguments in the court below, but it was claimed that R. F. Westcott was the partner, who got the third, that Carter was ignorant of Westcott's relation to the contracts, and that Carter had received what turned out to be the proceeds of these profits as gifts from Westcott, in all inno-

cence. And it was claimed that some few of the assets claimed by the Government were presents from Westcott and were not traced specifically from the thirds of divisions.

The court below as we have already seen held that Oberlin M. Carter was the beneficiary of investments made from the third of every division from No. 2, Jan. 3, 1893, to No. 31, made May 12, 1896, with the exception of division No. 6, made May 8, 1893.

System Established.

(a) Whether Westcott was the partner or whether Carter was the partner with Greene and Gaynor, the fact that one or the other of them was, is established, and admitted, and the "*system*" of division by thirds is established to have been commenced with Division No. 2.

(b) It was also established that a "system" had been adopted to conceal the fact of the division of the profits, between the contractors and Carter, by which the transfers were made by withdrawals of currency from the contractors' accounts and in a large number of instances exact corresponding amounts were traced as currency deposits at corresponding dates in Carter's accounts or in Westcott's accounts controlled by Carter.

The aggregate of such currency deposits so appearing and having no other accountable source being $578,299.86. (See table Main brief, p. 806.)

System.

> "When the object is to show SYSTEM, subsequent as well as prior offenses when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts the more complete the induction is."
>
> Wharton Crim. Ev., Sec. 38.

"Conspiracy cases give signal illustrations of the rule here stated. The acts of each conspirator emanate from him individually, yet when they are part of a *system* or conspiracy, they are admissible in evidence against his co-conspirators, although each component act may constitute an independent offense. The reason for the rule in this, and in similar cases, is that when once *system* is proved, each particular part of the system may be explained by the other parts which go to make up the whole."

Wharton Crim. Ev., Sec. 32.

"Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

The Slavers, 2 Wall., 401.

Castle v. *Bullard*, 23 How., 187.

"To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases, it is the only proof that can be adduced."

Rea v. *Missouri*, 17 Wall., 543.

"System" Applied to the Fourth Assignment of Error Sustained on the Appeal by the Circuit Court of Appeals.

THE DISPUTED DIVISIONS AFFECTING PARAGRAPH "(2)" OF DECREE OF MCH. 21, 1908.

This evidence referred to Main Brief, p. 639, under the head of Division No. 6, showing the following:

1893.

May 8. Deposits from Carter's disbursing checks to credit of J. F. Gaynor.....$45,000.00
One-third of which is $15,000.00.

May 8. Check J. F. Gaynor deposited to B. Greene's credit $22,360.00
May 8. Less check of B. D. Greene favor of unknown 7,360.00

Bal. left in Greene's acct.....$15,000.00

May 8. Deposit to J. F. Gaynor's credit as above. $45,000.00
May 8. Withdrawn to Greene.....$22,360.00
May 8. Withdrawn to unknown..... 7,640.00 30,000.00

Gaynor got $15,000.00
May 8. Check J. F. Gaynor favor of unknown... 7,640.00
May 8. Check of D. B. Greene as above, favor of unknown 7,360.00

Unknown partner got $15,000.00

We will see now how the third was deposited in Westcott's account, and the investments made therewith shifted over to Carter.

1893. *Deposits of Currency.*
May 13. Deposit to R. F. Westcott's credit in Union T. Co. bills ----------$500
May 15. Deposit to R. F. Wescott's credit with Van Deventer ---------- 3,000 $3,500.00

Bal. of third not deposited to May 15th---------- 11,500.00

May 23. Deposit to R. F. Westcott's credit in U. T. Co. bills------ $26,600.00
Of this deposit there is accounted for by a certified check of Westcott's cashed by him May 13, '93 (Main Brief, p. 640) ---------- $15,000.00

11,600.00

held that the $3,500 deposits, was a part of the $15,000 third, he curiously enough ruled (Vol. 1, p. 388):

> "There is no pretense but that Westcott was handling large sums of his own. While there may be a presumption that he looked after his one-third, that presumption cannot be carried too far. There is no just ground upon which to hold that the $11,500 ever came into Westcott's or Carter's hands, and, therefore, neither of them can be charged with it."

But the fact that checks to the amount of $15,000 were cashed for the third unnamed partner on May 8, '93, is proved by the documentary evidence. The court holds that $3,500 of that third went to Westcott's credit as currency deposits on May 13th and 15th.

Under the "system" established, is there not a presumption that Westcott or Carter received the $11,500 balance of that third?

Would it not be anomaly to conclude that they skipped getting this, where they got the third in the divisions made both before and afterwards? The fact that Westcott had a safety box, and that on May 23, '93, he deposited $26,600 in bills, raises the overwhelming presumption that at least $11,500 of this deposit came from that third of division. Especially is this true when it is admitted that there is no accountable source shown by the evidence from which this $11,500 of currency could have come, unless it came from that division money. (See admission of defendant's expert accountant, Vol. 16, p. 7784.)

It is true that there is an extra $100 included in the deposit of May 23, 1893, the source of which is also unaccounted for. But that is quite a small amount and could easily have been from Westcott's rents, of which it is shown he collected some monthly.

The Investments Made with the $15,000.

It is shown by the evidence collected in Main Brief, pp 640 to 643, that while R. F. Westcott was in possession of the $15,000 of Division 6 of May 8, 1893, he purchased on May 18, 1893, 10M Chi., M. & St. P. bonds at a cost of $12,662.50 through a broker, Van Deventer, with whom Westcott had a deposit of his own money to the amount of $8,513.75. It is there shown that Westcott kept or applied the $15,000 currency received from the third of division, but accounted to Carter for $2,337.50, the exact difference between the $15,000 and the $12,662.50, the cost of the said 10 bonds. This, therefore, was merely an exchange of funds in making the investment covered by:

Van Allen v. *Bank,* 52 N. Y., pp. 1-5, *supra.*

It is also there shown that on July 1, 1893, the first coupon period after the purchase of the bonds, Carter deposits the coupons to his own credit, and at sundry dates thereafter, and the bonds themselves are included in the receipt of October 29, 1897, from Carter to Westcott.

These 10M Chi., M. & St. P. bonds were sold along with others by J. H. Paul for O. M. Carter in April, 1900 (see main brief, p. 846b, and Exhibit 403, Vol. 28), and over $20,000 of these proceeds were spent by Paul for Carter and did not go into the investments made by J. H. Paul. (Main brief, p. 846(b) and 846(c).)

Notwithstanding the above facts, in place of the $8,513.75 of the $11,500 deposit of trust funds which went into Westcott's deposit on May 23, 1893, Carter was awarded by the decree of March 21, 1908, an equivalent amount of securities which were purchased by funds in Westcott's hands which the court held in its opinion of March 17, 1908, was traced from the trust fund, as will be seen presently under the head of the assignment of error, on the appeal to the Circuit Court of Appeals.

"System" Applied to the Third Assignment of Error Sustained on the Appeal by the Circuit Court of Appeals.

The following appears from the documentary evidence collected in Main Brief, p. 605, under head of Division No. 4 of March 13, 1893.

The contractors' accounts for the preceding month at Savannah were completed March 2, 1893, and Carter issued certain disbursing checks to the contractors which were deposited to J. F. Gaynor's credit in American National Bank, New York.

Dated March 6, 1893.	No. 224375 (Exh. 225, Vol. 31)	$34,985.47
Dated March 6, 1893.	No. 53122 (Exh. 197, Vol. 31)	10,000.00
Dated March 7, 1893.	No. 224376 (Exh. 225, Vol. 31)	2,819.64
		$47,805.11

Also one disbursing check deposited in local bank at Savannah, as follows:

Dated March 6, 1893. No. 224374 (Exhibit 226)...$16,433.14

Deposits to Gaynor's Credit New York.

March 13, 1893.	Deposit disbursing checks as above	$47,805.11
March 13, 1893.	Deposit Gaynor's check on local bank Savannah	194.89
		$48,000.00

One-third of which is.....$16,000.00

Deposits of Currency.

1893.

May 13. Deposit to R. F. Westcott's credit in Union T. Co. bills	$ 500	
May 15. Deposit to R. F. Westcott's credit with Van Deventer	$3,000	$ 3,500.00
Bal. of third not deposited to May 15th		$11,500.00

May 23. Deposit to R. F. Westcott's credit in U. T. Co. bills $26,600.00

Of this deposit there is accounted for by a certified check of Westcott's cashed by him May 13, '93. (Main Brief, p. 640) $15,000.00

$11,600.00

It is there shown also and as held by Judge Kohlsaat (Vol. 1, p. 387) that Greene was paid by Gaynor on March 13, 1893, his $16,000, one-third of this division.

It is there shown also that J. F. Gaynor's checks in favor of "unknown" or "unnamed" were paid by the American Exchange National Bank as follows:

Paid March 6, 1893, favor of unknown	$6,500
Paid March 7, 1893, favor of unknown	2,500
Paid March 13, 1893, favor of unknown	7,000
	$16,000

It is there shown that Carter made certain currency deposits to his own credit as follows:

March 14, 1893.	Credit U. T. Co., N. Y., to his own credit	$7,000.00
March 4, 6, 7, 9.	Currency deposits made by Carter at Savannah	$2,042.14

Judge Kohlsaat held that the $7,000 deposit and the purchases made therewith, were traced from the Greene & Gay-

nor division money, but that the balance of the third, $9,000, composed of the two checks paid on March 6th and 7th, for $6,500 and $2,500 was not sufficiently traced into Carter's or Westcott's hands, and the purchases shown to have been made with the $2,042.14, to wit: 25 shares of Savannah tow boat stock, included in stock certificate No. 217 (see main brief, p. 606a), were not sufficiently traced to the trust fund. He accordingly awarded in the decree (Vol. 1, p. 390) these shares of stock to Carter. This finding was made the subject of appellant's third and fifth assignments of error, on appeal to the Circuit Court of Appeals.

In reaching this erroneous conclusion Judge Kohlsaat in his opinion (Vol. 1, p. 387) says:

> "There is, however, something of certainty lacking in the evidence as to the $9,000. It seems to be fairly well established that Westcott was a partner of Greene & Gaynor, or at least interested in the profits of the contracts. The Government insists that even if he was, he was serving Carter's interests in that connection, and that under the rule stated he can be charged with the whole $16,000 of the fourth division. *There is no system claimed for the dealings between Carter and Westcott.* If, as a matter of fact, Carter never received this $9,000, and no part thereof was invested in the securities before the court, then Carter, can, at the most be held only for this sum on a money judgment. There is no direct evidence that either he or Westcott ever had this sum. Carter did have on deposit at Savannah some $1,542.14 and he purchased $500 exchange, all about March 4th to 9th, 1893. But considering the withdrawal by Gaynor of the $9,000 several days prior to the deposit of the $48,000 in the New York bank, together with the other facts in the case, the proof is not sufficient to enable the court to find that this sum of $9,000 ever same into Carter's or Westcott's possession, or that he should be charged therewith."

But the learned judge overlooked the fact that in this division, the evidence does not show that Westcott figured at all, except that in Carter's testimony he says that Westcott

made him a present of the $7,000 of currency which was deposited to Carter's credit in Carter's own bank account, after a "Grand Central depot" visit on March 14, 1893 (see Main brief, p. 605) and he testified that the $2,042.14 currency deposits made by him in Savannah on March 4th to 9th were from previous gifts made to him by Westcott. (Vol. 12, p. 5500.)

But the court held that the $7,000, which was deposited directly in Carter's account on March 14th came from the $7,000 check cashed by Gaynor's bank on March 13th, and the rule "*falsus in uno falsus in omnibus*" is certainly applicable here.

It is the duty of the court to apply that rule.

The Santissima Trinidad, 7 Wheat., 339.

Henderson v. *Louisville, etc., R. R.*, 123 U. S., 64-65.

Moreover, the judge overlooked the fact that all the currency deposits corresponding to the thirds of divisions, in divisions 2, 3 and 4 went directly into Carter's account and to his own credit and not to Westcott's credit (see main brief for deposits under heads of those divisions) and that it was not until the 6th division that they commenced to cover up these deposits by putting them to Westcott's credit.

Moreover, when the judge said that, "There is no system claimed for the dealings between Carter and Westcott" he overlooked the fact that it was not only claimed but proved that there was the most perfect system established for these dealings, viz.: a complete accounting and settlement from time to time made by Westcott to Carter for every dollar which Westcott handled of the trust fund in any way.

Commencing with the 5th division, which is the first in which the currency deposits went to Westcott's credit, there is shown to have been complete adjustments between Westcott and Carter in which when Westcott is charged with the

currency deposits and coupons collected and creditd with the investments made, he remits the balances to Carter.

See adjustment to May 11, 1893, main brief, p. 615.

See adjustment to May 18, 1893, main brief, p. 643.

See adjustment to July 14, 1893, main brief, p. 658.

See adjustment to October 18, 1893, main brief, p. 667.

See adjustment to November 15, 1893, main brief, p. 671-2.

See adjustment to January 12, 1894, main brief, pp. 678-687.

See adjustment to February 6, 1894, main brief, pp. 690-691.

See adjustment tc March 27, 1894, main brief, pp. 695-697.

See adjustment to June 1, 1894, main brief, p. 699.

See adjustment to February 4, 1895, main brief, pp. 730-731.

See adjustment to May 1, 1895, main brief, pp. 767-768.

See adjustment to May 1, 1895, main brief, p. 770.

See adjustment to May 11, 1896, main brief, p. 781.

See adjustment to October 26, 1896, main brief, p. 790.

See adjustment to October 29, 1897, main brief, pp. 791-793.

These adjustments show that there was "system" established of a complete accounting from Westcott to Carter for every dollar of the trust fund which went into Westcott's hands during the entire period covered by the transactions.

Carter was the beneficiary of every dollar of the income from the investments from the date of the investments. (See Summary table, Main brief, pp. 816-817.)

When it is established that Carter was the beneficial partner and was getting directly and indirectly one-third of the profits in practically all of these 30 divisions of the profits, both before and after this division No. 3, as held by the judge himself. When it is shown that checks were cashed by Gaynor aggregating the exact third, $16,000 for the unnamed

partner and that Carter got at least $7,000 of it, under the "system" established it is a presumption of law arising from those facts that he did get the balance of the $9,000, arising from the $6,500 and $2,500 checks of Gaynor.

The complainant, however, has not attempted to claim any assets as rising from this $9,000 except the investments in tow boat stock made out of the currency deposits of $2,042.14 made by Carter May 4th to 9th, 1893, in Savannah.

The certificate, No. 217, for these 25 shares of stock is dated February 20, 1893 (Vol. 29, Exhibit 449A1), but was not paid for by Carter until after he had made these currency deposits aggregating $2,042.14 March 4th to 9th, 1893. Since the amount which would be paid to the contractors for division for February account was fully known on March 2, 1893, the presumption is that John F. Gaynor's check for $2,500 on the New York bank was cashed in Savannah on March 4, 1893, and that the proceeds of that check was delivered to Carter as an advance on the division which was to be made in New York in a few days, and that this was the source of the $2,042.14 currency brought out by Carter in Savannah on March 4th to 9th. If it were done in that way it would have given the $2,500 Gaynor check just time to have reached the New York bank and he charged up in Gaynor's account on March 7th, as it is shown to have been charged up.

The fact that Carter in some way got the proceeds of this $2,500 Gaynor check, is a presumption of fact arising from the "system" established, and the circumstances show that it could have been done this way, and this is the most likely way in which it could have been done.

Carter does not claim that the $2,042.14 currency was his otherwise than as a part of alleged gifts from Westcott which have been disproved.

Carter's Grand Central depot visits in which he attempt to

account for $435,000 currency deposits (Main brief, pp. 807-8) of which the $7,000 deposit of March 14, 1893, is claimed to be a part, has been totally destroyed by Rossiter's testimony. (Main brief, p. 812.)

The contention that because Gaynor advanced Carter $2,500 on account of his third, before the disbursing checks for that division were deposited in Gaynor's account, that therefore investments made by Carter from that $2,500, cannot be considered as derived from the profits of the contracts, cannot stand. It was merely an exchange of funds with the rule of

> *Van Allen* v. *Bank,* 52 N. Y., 1-5, approved by the Supreme Court in *Nat. Bk.* v. *Insurance Co.,* 104 U. S., 70.

It is, therefore, insisted that the third assignment of error was rightly sustained by the Circuit Court of Appeals, as well as so much of the fifth assignment as relates to the tow boat stock in certificate 217.

"System" Applied to the Second Assignment of Error Sustained on Appeal by the Circuit Court of Appeals.

It is shown by the documentary evidence collected in complainant's Main Brief, pp. 246, and 262, *that commencing with contract No.* 4572 *of May* 4, 1891, let to John F. Gaynor, there was in the face of the contracts a jump of 300 per cent. in the cost of brush mattresses in the Savannah district over what the same kind of mattresses had previously cost. And that this was accomplished through the exercise by Carter of certain options reserved in the specifications to Carter as engineer, by selecting the cheapest design after the contracts were let. The jump in the price was not apparent in the face of the contracts because it would become apparent only after Carter had exercised his option in taking the cheapest design.

On this point (Vol. 1, p. 381) Judge Kohlsaat said:

> "It must be borne in mind that the transactions in suit covered the period from December, 1891, to 1897, during which period a number of contracts were let, and that even though Carter was not in actual conspiracy with the contractors, yet if he knew of their vast profits on the prices allowed them on the earlier work, it was his duty to investigate thoroughly the situation and see to it that the Government thereafter paid no more than was fair and just."

And (Vol. 1, p. 382), he said:

> "Suffice it to say that without passing directly upon the questions as to whether Carter had actual knowledge of and connived at this raid upon the Government, the facts brought out concerning these financial transactions are such as that he must, as a conclusion of law be held chargeable with knowledge of what was being done in the premises."

Notwithstanding the fact that the enormous jump in the

prices, and various irregularities resulting in enormous profits to the contractors is admittedly shown to have commenced in 1891, and notwithstanding that contemporaneously with these frauds developed in the work, there is shown to have occurred in the course of the years 1891-2 a series of large deposits of currency in Carter's bank account, on the same dates that similar large amounts of currency are withdrawn from the bank accounts of the contractors, to wit (see division 1, main brief, p. 554):

Dec. 18, '91.	Withdrawal by D. B. Greene from American Ex. Nat. Bank, N. Y.	$ 1,500.00
Dec. 18, '91.	Deposit to credit of O. M. Carter in Union T. Co., N. Y., currency...	1,400.00
June 8, '92.	Withdrawal by B. D. Greene from American Ex. Nat. Bk. N. Y...	2,500.00
June 8, '92.	Deposit to credit of O. M. Carter in Union T. Co., N. Y., currency..	2,500.00
July 22, '92.	Withdrawal by J. F. Gaynor from American Ex. Nat. Bk., N. Y....	10,000.00
July 22, '92.	Deposit to credit of O. M. Carter in U. T. Co., N. Y., currency.....	8,100.00
July 22, '92.	Deposit by O. M. Carter to the credit of R. F. Westcott in U. T. Co., currency	2,000.00
	(Said $2,000 returned to Carter by Westcott on Aug. 26, '92.)	
Oct. 29, '92.	Withdrawal by John F. Gaynor from American Ex. Nat. Bk., N. Y....	2,500.00
Oct. 29, '92.	Deposit by O. M. Carter to credit of his wife M. W. Carter in Garfield N. Bk., N. Y. currency.....	2,450.00
	($2,000 of said amount transferred from wife's acct to Carter's account Nov. 7, '92, by her check.)	
	($385.81 of said amount transferred from wife's account to Carter's acct. Jan. 16, '93, after her death.)	

Because of the fact that the system of division *by thirds* is not shown to have commenced until January 3, 1893, when the division of the profits of the great contracts let by Carter

in the fall of 1892 commenced to be divided, the learned judge in the court below reached the conclusion, that the above coincidences coupled with the other evidence was not sufficient to indicate that the deposits in Carter's accounts came from the corresponding withdrawals in the contractors' accounts. He accordingly awarded to Carter all of the assets purchased with the above deposits, which are claimed by the Government as investments of the trust funds. This was made the subject of appellant's second assignment of error, and was also covered by a part of the fifth assignment of error, on appeal to the Circuit Court of Appeals.

In reaching his conclusion on this question, Judge Kohlsaat, after referring to the above coincidences, says (Vol. 1, pp. 384-5):

> "It also appears that Greene & Gaynor also severally withdrew other sums from their accounts *about* the same time, viz.: on June 6, 1892, Gaynor $2,575; on July 21, 1892, Greene $11,000. At these particular dates, Greene and Gaynor had no Government contracts on hand, and there is no reasonable theory upon which these payments can be held to have grown out of the contracts in question. They and one Hegeman were then partners in the construction of a railroad. Nothing appears in the record save the coincidences of amounts and dates aforesaid, upon which to make a finding against defendant as to these items."

It is difficult to see how the check of Gaynor for $2,575, which his account shows was charged to his account June 6, 1892 (Exhibit 593, Vol. 29), has to do with the question or what the check of Greene for $11,000 to Hegeman, which his account shows was charged to his account July 21, 1892, has to do with the question; that check, it appears, was dated July 18, 1892. (Exhibit 242, Vol. 31.) Neither of those items were claimed to be coincident with any corresponding deposits of currency in Carter's account. The fact that Greene and

Gaynor paid out money to other people and at other times does not affect the question.

If Hegeman had received the moneys from Greene and Gaynor at the dates of these withdrawals which are coincident with the Carter deposits, instead of Carter, it could easily have been proved by Greene and Gaynor in the removal proceedings or by Carter in these proceedings. Hegeman was a witness for Carter before the Court Martial.

The fact that the withdrawals in question by Greene and Gaynor came from the jetty contract is shown by the following:

The testimony of John F. Gaynor for defense (Vol. 2, p. 931) shows that Anson M. Bangs, a brother-in-law of Gaynor's, who had been a partner with Greene & Gaynor in contracts in the Savannah District, dissolved partnership with them some time prior to the 1892 contracts.

The Atlantic Contracting Co. was chartered July 22, 1892, and Bangs' name does not appear in the charter. (Vol. 23, p. 11029.)

It appears that for some deferred payment on contract 4224 of Nov. 5, 1890, a disbursing check No. 167669, $35,122.92, was issued by Carter Sep. 4, 1891, and deposited in Greene's account, and Sep. 21, 1891, Greene gave Bangs a check for a third of it, $11,707.64. (Ex. 434, Vol. 28.) This is the last contract under which the evidence shows that Bangs retained any of the profits.

There was a disbursing check of Dec. 1, 1891, for $13,561.13 cashed Jany. 19, 1892, which bears the endorsement of J. F. Gaynor to Bangs and from Bangs to B. D. Greene, but that went to Greene's account. (Ex. 330 K, Vol. 29.)

It further appears that the following disbursing checks, shown on Exhibits 216 and 285 (Vol. 31), issued on the contracts let in 1891, all went to the credit of B. D. Greene in the American Exchange National Bank on the following dates:

Sept. 21, '91	Check No. 167671	Ex. 434	Vol. 28	$27,335.65
Oct. 12, '91	Check No. 167695	Ex. 330H	Vol. 29	23,424.32
Nov. 13, '91	Check No. 167746	Ex. 330I	Vol. 29	7,925.88
Nov. 13, '91	Check No. 167747	Ex. 330I	Vol. 29	7,235.05
Dec. 1, '91	Check No. 199962	Ex. 330J	Vol. 29	7,837.17
Dec. 18, '91	Check No. 199963	Ex. 330J	Vol. 29	11,899.71
Dec. 18, '91	Check No. 199964	Ex. 330J	Vol. 29	8,054.29

The testimony of Greene and Gaynor for the defense is that while the disbursing checks were deposited to the credit of one of them, they divided the money from them equally between them after Bangs ceased to be a partner. (Main Brief, p. 512a.)

The following large deposits are shown to have been made in Gaynor's account in the American Exchange National Bank during this period, as shown by Exh. 593, Vol. 29.

May 17, 1892	$23,300.56
June 18, 1892	18,972.12
June 21, 1892	18,184.40
Aug. 27, 1892	17,339.84
Oct. 1, 1892	5,935.36

From which it appears that there was ample funds in the American Exchange National Bank to the credit of Greene and of Gaynor arising from the contract profits to pay the withdrawals from their accounts contemporaneously with the deposits in Carter's account.

Moreover, the currency deposit of $1400 in Carter's account on Dec. 18, 1891, corresponding to the $1,500 withdrawal of Greene from his account on that date, was on the same day that Carter's disbursing checks for $19,954 was credited in Greene's account.

Why there was a delay for a few months in not paying over the other sums to Carter and why it was paid to him in several amounts, is not important, this was the beginning of the division of the profits, before they had become so bold, and it may have been to do it in a way least likely to attract notice.

The amounts received by Carter during this period seem to have been in the nature of payments for illegal favors rendered which swelled the contractors' profits, rather than for any fixed ratio of profits.

The other receipts by Carter in 1892 were just antecedent to the charter of the Atlantic Contracting Co. and while the arrangement for the letting of the big contracts of 1892, under which Carter is shown to have got an exact third, was in progress. It may have been that the payments at that time to Carter were inducements given him for entry into the full partnership which followed, and as a reward for what he had done to increase the profits under the 1891 contracts as well. The fact that the last payments were made shortly after the completion of the 1891 contracts, does not alter the presumption. The rule is thus stated:

> "And even when the confidential relation has terminated if only a short time has elapsed since the termination of such confidential relation, the suspicion of undue influence will attach, and proof positive of good faith and square dealing must be present in order to secure a recognition of its validity by the courts."
>
> Tiedeman on Equity Jur., Sec. 235 (*supra*).

The learned judge overlooked the fact that the evidence according to his own findings had fully established the fact that commencing with Division 2 and running through a period of four years, it was fully established that there had been established a "system" by which the profits of the contracts were divided by withdrawals of money from the accounts of the contractors, and deposits of *currency* made in the accounts of Carter or of Westcott at corresponding date, this "system" evidently was adopted for the purpose of concealment, so far as to the method of withdrawals and deposits are concerned. This "system" is shown by the "coincidences" to have commenced in 1891. The coincidences in Division No. 1 are not to be considered alone, as the learned judge

seems to have done, but are to be considered in connection with the similar coincidences which run through the subsequent thirty divisions aggregating deposits of currency to the amount of $578,299.86. (See Table, Main Brief, p. 806.) As stated by Mr. Wharton:

> "When the object is to show system, *subsequent* as well as prior offenses, when tending to establish *identity* or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts the more complete the induction is."
>
> Wharton Crim. Ev., Sec. 38.

> "The reason for the rule in this, and in similar cases, is that when once *system* is proved, each particular part of the system may be explained by the other parts which go to make up the whole."
>
> Wharton Crim. Ev., Sec. 32.

It was the failure of the court to apply these principles of law, in connection with the proof of the fact that the big frauds commenced under the contracts of 1891, which led the court to a wrong conclusion as to the significance of the coincidences in Division 1. Then, too, when Carter's claim to a half million of the investments made with these currency deposits, as gifts from Westcott, is proved to be false. It was an anomaly to hold that the assets purchased from the $16,450 of currency deposits in Division 1 were gifts from Westcott, when there is no evidence to support it other than Carter's own statement.

As stated by the Supreme Court:

> "It is a settled rule of this court, that if a party will attempt to impose upon this court, by knowingly or fraudulently claiming as his own property belonging in part to others, he shall not be entitled to restitution of that portion which he may ultimately establish as his own."
>
> *Dos Hermanos,* 5 Wheat., 76-96.

Certainly the legal presumptions under the facts are all against Carter's claim to these deposits in Division 1 as gifts from Westcott.

No support to Carter's contention that these sums were gifts to him from Mr. R. F. Westcott can be had from the latter's testimony, if that is admissible for any purpose. (See Main Brief, pp. 514-515.)

Assets Purchased from the Currency, Deposits Division I.

The evidence collected in Main Breif, p. 556 (a) shows that the following assets were purchased with the "corresponding currency deposits" made in Carter's account in Division 1, to-wit:

48.22 Shares Savannah Towboat stock in certificates Nos. 133, 145, 152, 170, cost		$3,600.00
5 Shares of Savannah Cotton Mill stock, par value. (Which are awarded to Carter in the Decree of Mch. 21, 1908, Vol. 1, p. 390.)		500.00
Also:		
5 M. Genl. Electric bonds, cost		$5,100.00
5 M. Ches. & Ohio 4½% bonds, cost	$4,206.00	
Less coupons credited	112.50	$4,093.50

The above 5 M. Ches. & Ohio bonds were sold (Main Brief, p. 567) in the account of O. M. Carter on Jan. 3, 1893, for $3,981 and the proceeds were applied in part payment of a purchase in Carter's name on Jan. 3 and 4, 1893, of

5 M. Erie 2nd Consol. bonds
5 M. Reading 4% bonds
5 M. Wabash 1st 5% bonds.

The decree in the lower court did not award Carter any of the above specific bonds into which the $3,981.00 is shown to have gone, but gave Carter instead, see (Vol. 1, p. 390):

5 M. Ches. & Ohio bonds Nos. 21025 to 21029 purchase in Division 3, Feb. 11, 1893, for $5,275.00

These 5 M. Ches. & Ohio bonds were purchased Feb. 11, 1893, out of a currency deposit of $15,850.00 (Main Brief, pages 601 and 602) which Judge Kohlsaat held in his opinion (Vol. 1, p. 386) came from the fraudulent profits of the Greene & Gaynor contracts.

The 5 M. Genl. Electric bonds purchased in Division 1 were sold (Main Brief, p. 614) in the account of R. F. Westcott April 18 and 19, 1893, for $4,928,75 and the proceeds applied in part payment of the purchase of Apr. 28 and May 1, 1893.

10 M. Morris & Essex bonds.....$13,640.00
5 M. Chi. St. P. M. & Om. bonds Nos. 2093, 21116 to 21118 and 21123 for.....$ 6,106.25

The decree in the Circuit Court (Vol. 1, p. 390) awarded these 5 Chi. St. P. M. & Om. bonds purchased April 28, 1893, to Carter.

The 48.22 shares of Towboat stock,
The 5 shares of Cotton Mill stock,

The 5 Ches. & Ohio bonds purchased Feb. 11, 1893, and
The 5 Chi. St. P. M. & Om. bonds purchased Apr. 28, 1893,

are all the securities awarded to Carter which are affected by the question of who is the owner of the currency deposits in Division 1.

Other Securities Awarded Carter.

The decree of Mch. 21, 1908, however (Vol. 1, p. 390), awards the following additional securities to Carter:

5 M. Chi. St. P. M. & Om. bonds purchased April 11, 1893, Nos. 20242, 15926, 19282, 16101 and 16672 for.....$6,143.75

The above bonds were purchased (Main Brief, p. 613) on April 11, 1893, in Carter's name through C. H. Van Deventer,

broker, and paid for partly with $5,000 loan previously made by O. M. Carter to Van Deventer, by check of O. M. Carter dated Mch. 15, 1893, on the Union Trust Co. (Exhibit 228, Vol. 31.)

Carter had deposited in the Union Trust Co. on Mch. 14, 1893, bills.....$7,000.00

And this deposit was held by Judge Kohlsaat to be a part of the profits of the Greene & Gaynor contract, received by Carter in Division 4. (Vol. 1, p. 387.)

The rest of the purchase price of the above bonds were paid for (Main Brief, p. 613) from a deposit of currency $14,500 made Apr. 14, 1893, on R. F. Westcott's account transferred to Carter's account April 14, 1893. And Judge Kohlsaat held (Vol. 1, p. 388) that this $14,500 deposit on Westcott's account came from the profits of the Greene & Gaynor contracts in Division 5.

So that the above 5 M. Chi. St. P. M. & Om. bonds purchased April 11, 1893, are by the judge's own finding traced directly from the Greene & Gaynor profits. The grounds on which he gave them to Carter will be now stated.

The following investments, or proceeds thereof, the court, as we have already seen, had held were not traced from the Greene & Gaynor profits, to-wit:

Proceeds of sale Jan. 3, 1893, of 5 M. Ches. & Ohio bonds purchased in Division 1	$3,981.00
Proceeds of sale Apr. 18 and 19, 1893, of 5 M. Gen. Electric bonds purchased in Division 1	4,928.75
Proceeds of sale Apr. 4, 1900, by J. H. Paul (Main Brief, p. 846b) of 10 M. Chi. M. & St. P. bonds purchased in Division 6 from which (Main Brief, p. 642) $8,513.75 was traced from Westcott's funds which the court held was not an exchange for $11,500 claimed by the complainant in Division 6	8,513.75
	$17,423.50

In lieu of the above the court awarded Carter:	
The 5 Ches. & Ohio bonds purchased Feb. 11, '93, cost	$ 5,275.00
The 5 Chi. St. P. M. & Om. bonds purchased Apr. 11, 1893, cost	6,143.75
The 5 Chi. St. P. M. & Om. bonds purchased Apr. 28, 1893, cost	6,106.25
	$17,525.00

If the court below was wrong in its conclusions as to Divisions 1 and 6, then the whole of the above award to Carter was error.

Even if it were right as to Division 6, still since the 10 M. Chi. M. & St. P. bonds into which the $8,513.75 went in Division 6, were afterwards sold by Paul for Carter along with other bonds, and the re-investments of the proceeds made by J. H. Paul which were traced, lacked over $20,000 of the trust securities sold, Main Brief, p. 846 (b) and (c), the part dissipated should be held to have been Carter's, and he should not be given an equivalent amount from the trust securities which are preserved.

Knatchbull v. *Hallett,* 12 Ch. D., 696, approved in *Nat. Bank* v. *Ins. Co.,* 104 U. S., 54.

The Award of the 5 C. & O. Bonds Purchased Apr. 11, 1900.

The decree of Mch. 21, 1908 (Vol. 1, p. 390) also awards O. M. Carter 5 C. & O. 4½% bonds purchased through J. H. Paul for Carter April 11, 1900, from the proceeds of the sale of bonds held by the court to have been purchased with the profits of the Greene & Gaynor contracts.

These bonds were purchased by J. H. Paul through Tracy & Co., brokers, on April 11, 1900, along with 5 others, Exhibit 403, and the check for the 10 bonds, $9,987.50, was charged in Paul's account in the Kings Co. bank Apr. 12, 1900, and the money to pay for them arose from the securities held by the court to have been purchased with the diverted trust fund. See Main Brief, p. 846 (b) and (c).

This is not disputed.

But the court gives these 5 C. & O. bonds to Carter, in lieu of 5 Wabash 1st 5% bonds Nos. 16135 to 16138 and 16140 originally purchased by Westcott Jan. 20, 1890, and which bonds were sold for $5,093.75 along with 5 other like bonds on May 19, 1897, as contended by complainants (Main Brief, pp. 792-793) and applied by Westcott to the payment to him of Carter's half interest in the Orange, N. J., property.

The court held that these 5 Wabash bonds were not bought from Westcott by Carter in Division 14 in 1894, as contended by complainant. (Main Brief, pp. 680-687.) That therefore they represented a gift from Westcott to Carter of that much interest in the Orange property.

As in a subsequent partition of the Orange property between Westcott and Carter, the sum of $7,953.22 difference in money was paid over Nov. 6, 1899, to J. H. Paul for Carter (see Main Brief, p. 846 (b)), the court held that the proceeds of the 5 Wabash properly represented a part of this money, which Paul deposited in the Kings Co. bank.

And as the 5 C. & O. bonds purchased by J. H. Paul on Apr. 11, 1900, were paid for out of the fund in the Kings Co. bank, the court gave Carter these 5 C. & O. bonds in lieu of the 5 Wabash 1st bonds.

There are two complete answers to this.

First, even if it be conceded that Carter owned in his own right $5,093.75 of the $106,061.19 of the fund put in the Kings Co. bank, Main Brief, p. 846 (b), still over $20,000 of that fund was dissipated or applied by J. H. Paul to Carter's own purposes and not re-invested. (Main Brief, p. 846 (c)).

In such a case the law will presume, as we have seen, that the part dissipated was his own fund and not the trust money.

Second, the evidence which is collected in (Main Brief, pp. 680-687) ought to be conclusive that Carter had purchased the 5 Wabash bonds about January, 1894, from Westcott, by an exchange of the trust funds therefor.

We have now disposed of all the questions raised by appellants' 5th assignment of error, on the appeal to the Circuit Court of Appeals.

THE SALARY ALLOWANCES TO L. D. AND I. S. CARTER.

The Sixth Assignment of Error, Discussed, Sustained by the Circuit Court of Appeals.

The sixth assignment was based upon the finding of the master allowing I. Stanton Carter to set off against the cash proceeds of the diverted trust fund which the master (and the court) found traced into his hands, an allowance of $6,750 for salary claimed to be due him by O. M. Carter for handling these assets. (*Ante*, pp. 36.....)

The court in its interlocutory decree of January 7, 1904, on exceptions to the master's report disallowed this salary claim tentatively as against certain traced assets turned over to the receiver in hand, but reserved its decision as to such allowance as against the assets not turned over until the final decree.

In the final decree of March 21, 1908, paragraph 12, Vol. 1, p. 394, the court gave the complainant a money judgment only for $11,454.18, balance of the trust fund unaccounted for by him "as found by the special master." (See Master's Report, Vol. 10, p. 5070.)

This balance was arrived at by the master by giving I. S. Carter credit as against the trust fund converted into money in his hands among other things for the $6,750.00 salary. See statement of master, Vol. 10, p. 5057.

The balance there stated to be unaccounted for to the date of the report, by I. S. Carter is.....	$13,471.19
From which was deducted the cost of Kentucky Central bond and 1 telephone bond subsequently turned over to the receiver.....	2,017.01
	$11,454.18

The decree thus allows I. S. Carter to set off this $6,750 salary claimed to be due him by O. M. Carter against the balance of trust assets converted into cash and unaccounted for in his hands.

This is erroneous both because I. S. Carter received these assets into his hands with notice of the Government claims thereto (see Main Brief, pp. 651-2-3) and because by the agreement of November 6, 1901, he was bound to disclaim all personal interest in these assets.

The Circuit Court of Appeals was therefore right in disallowing the credit of $6,750 given to I. S. Carter for salary as against the assets withheld by him and unaccounted for to this day, and right in increasing the money judgment given against him to $18,204.18 (Rec., Vol. 33, p. 13431).

This error not only affects the amount of the money judgment against I. S. Carter by $6,750, but also affects by that much the question as to whether I. S. and L. D. Carter have complied with that part of the agreement of November 6, 1901, which required them to turn over substantially all of the assets received by them from J. H. Paul, Robert E. Westcott and James F. Bragg, which was the condition precedent for the allowances to be made to defendants and their counsel, which last question is more specifically raised by the 14th assignment of error, on appeal to the Circuit Court of Appeals.

The contention of counsel for Carter that $3,450 of salary claim was conceded by complainants' counsel before the master and should have been allowed by the Circuit Court of Appeals is disposed of in appellants' brief on the direct appeal, to which reference is here requested.

Brief Direct Appeal p. 62

The Twelfth Assignment of Error Sustained by the Circuit Court of Appeals (Salary Allowances).

The master stating the account of L. D. Carter with the trust fund, admitted to have been received by him, gave him credit (Vol. 10, p. 5068) for $12,916.66 for salary claimed to be due him by O. M. Carter for 15½ months' services, and set it off against the assets retained by L. D. Carter.

This finding of the master was excepted to by the seventh exception to master's report (Vol. 1, p. 340, *et seq.*), but the finding was sustained by the Circuit Court, in its decree by its refusal to give any money judgment against L. D. Carter. The allowance of that credit affected also the question of whether L. D. Carter and I. S. Carter had accounted for all the assets which they had received from Paul, Westcott and Bragg. The allowance was improper, for precisely the same reasons that the salary allowance out of the trust assets was improper in the case of I. S. Carter, viz.: he took the assets with notice of the government's claims, and second by the agreement of November 6, 1901, he was bound to disclaim all personal interest in these assets. After disallowing that credit, the Circuit Court of Appeals found the balance unaccounted for by him as found by the master $7,577.04, and gave judgment against him for that amount (Rec., Vol. 33, pp. 13431 and 13436).

THE DEFICIENCY JUDGMENT AGAINST O. M. CARTER.

The Sixteenth Assignment of Error Sustained by the Circuit Court of Appeals (Deficiency Judgment Against O. M. Carter.)

The sixteenth assignment of error was laid on the refusal of the Circuit Court to give appellants a money judgment for $105,019.66 against Oberlin M. Carter for the proceeds of securities which the court by the third clause of the decree of March 21, 1908 (Vol. 1, p. 391) and the receipts of October 11 and October 29, 1897, referred to in the decree, held belonged to the United States as a part of the diverted trust fund, and were in Carter's hands in October, 1897, charged with a trust in favor of the United States, and which securities he subsequently applied to the payment of his attorneys, Kellogg & Rose, and for other purposes, or otherwise dissipated.

The securities converted by Kellogg & Rose, Carter's attorneys, and retained by them on account of fees were described in the sixteenth assignment of error on the appeal to the Circuit Court of Appeals by serial number. They were:

13 U. S. coupon 1904 bonds, sold by Kellogg & Rose, October 12, 1897, for	$14,990.62
200 shares Del. & Hud. stock, sold by Kellogg & Rose, November 23, 1897, for	21,875.00
10 Mil. & St. Paul bonds, collected by Kellogg & Rose, March 12, 1898, for	10,000.00
2 receiver's certs. B. & O. R. R., sold by Kellogg & Rose, April 27, 1898, for	9,943.33
	$56,808.95

The facts that the bonds were so sold by Kellogg of the

firm of Kellogg & Rose, appears by Exhibits 417 and 418 in Vol. 28.

The fact that they are the identical securities that the court decreed Carter held as belonging to the United States appears by comparing the serial number of the securities (Vol. 1, p. 420) with the securities specified in the Carter receipts of October 11 and 29, 1893, Exhibits B and C to the decree (Vol. 1, p. 401).

The balance of the $105,019.66 specified in said sixteenth assignment of error, as having been dissipated by O. M. Carter, consists of payments from the trust funds traced into the hands of I. S. and L. D. Carter, as found by the master, made prior to the receivership to Carter's attorneys, payments on a note due his mother, and for printing, as will be seen by comparing the items specified in the sixteenth assignment for error (Vol. 1, pp. 420-1) with the items for which I. S. Carter is given credit by the master (Vol. 10, pp. 5056-7) and for which L. D. Carter is given credit by the master (Vol. 10, p. 5068), as having been paid out by them for O. M. Carter prior to the receivership, from the trust funds traced into their hands.

This $105,019.66 of the trust fund, traced directly from the proceeds of the securities which the court in its decree holds Carter held in October, 1897, as a trust fund belonging to the United States has been applied under Carter's directions by his agents, to Carter's purposes. It is difficult to understand on what principle of law the Circuit Court denied the complainants a money judgment therefor. In a case in which the prayers were exactly similar to the prayers of the bill, in this case, and where the funds charged with a trust were partly transferred beyond the reach of the court by the defendant, the Supreme Court gave the complainant a *money judgment* for such part of the assets as had been converted or which could not be reached.

The court said:

> "Where a trustee had abused his trust in the same manner, *the cestui que trust* has the *option* to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, *then its value in money.*"
>
> *May* v. *Le Claire*, 11 Wall., 236.

As we have heretofore pointed out the same option exists where the trustee has dissipated the trust fund.

It was contended by the defendant's counsel that the purport of the agreement of November 6, 1901, was let to O. M. Carter go scot free, for all the trust assets belonging to the government he or his agents may have dissipated prior to the receivership, but there is nothing in that agreement which is capable of that construction.

There are provisions excusing the defendants from turning over *to the receiver* to be held pending the litigation, any of the assets which had got beyond their control prior to the receivership. But that provision did not free the defendants from ultimate liability to the United States for any such assets so dissipated prior to the receivership. Neither did it give the United States the ultimate right to the assets which they did turn over to the receiver,—those questions were reserved for adjudication, and the provision was merely to provide for the safe keeping of the assets remaining in the hands of the defendants at the date of the appointment of the receiver.

Paragraph "(3)" of the stipulation expressly provided:

> "And nothing in this agreement shall be construed as affecting the right of the Government, if any, it has to recover any part of said assets disposed of by said defendants and not turned over to the receiver."

Carter's Contention as to the Deductions.

In the 19th assignment of error filed by O. M. Carter on his cross-appeal to the Supreme Court it is stated:

> "That the court in and by its decree of March 18, 1909, committed error in holding that only the face value of Carter's property in court be credited to determine the deficiency decree, against him; because the court should have held that the market value of said property, together with the interest thereon which has been collected by the receiver, should have been credited to his account in order to determine the amount of any deficiency decree."

This assignment of error made by O. M. Carter is made upon the finding of the Circuit Court of Appeals (Rec., Vol. 33, p. 13429) that it was undisputed that items aggregating $105,019.66 of the fund held by the Circuit Court to be a part of the trust fund had been dissipated by O. M. Carter subsequent to the receipts given by O. M. Carter to Westcott in October, 1897, an dprior to the receivership, and that the United States was entitled to a money judgment therefor; but that court then followed said statement with the following:

> "In view, however, of the above mentioned finding by the trial court, that the securities set apart to Captain Carter in paragraph "(2)" of the decree, were not derived from the fraudulent transactions, and of our conclusions (as above stated) that such securities are, nevertheless subject to the trust, as substitutes for securities dissipated, their face value (as scheduled) should be deducted from the above mentioned aggregate, to ascertain the amount of the deficiency judgment."

Reply.

The face value of the securities scheduled in paragraph "(2)" of the decree of March 21, 1908, (Rec., Vol. 1, p. 390) which Judge Kohlsaat held not traced and awarded to O. M. Carter was $34,600.00.

Of these, however, the following are worthless:

25 shares Seaboard Company stock, par value (Testimony of Carter, Rec., Vol. 1, pp. 4147-8).....$2,500.00

5 shares Savannah Cotton Mill stock, par value (Testimony of Carter, Rec., Vol. 13, pp. 6132-33).$ 500.00

Carter at least has no cause to complain that the Circuit Court of Appeals credited all these securities to him, at their face value, instead of their market value.

We insist, however, that the Circuit Court of Appeals should not have made any deduction at all, but should have given the United States a judgment for the whole $105,019.66 of the trust funds so admitted to have been dissipated.

(a) Because the Circuit Court of Appeals had already said that the $35,885.23 advanced to Carter pending the litigation and the other costs and expenses of the litigation, were chargeable against these $34,600.00 of assets held by Judge Kohlsaat in paragraph "(2)" as not traced. (Rec., Vol. 33, p. 13428.)

It follows therefore to set off the same $34,600 against the $105,019.66 dissipated by him prior to the receivership was to give him credit for the same thing twice:

(b) Because as we have already shown in this brief the said $34,600 of said assets were actually traced by the evidence as investments of the trust fund, and should have been so held by Judge Kohlsaat in the first instance. The Circuit Court of Appeals held them to be a part of the trust fund without finding definitely as to the actual tracing in detail.

In the next place if Carter is to have credit as he claims for the income from the $34,600 of assets in paragraph "(2)" from the time the same went into the hands of the receiver in 1901, then the United States should have interest on the balance of the $105,019.66, to wit: on the sum of $70,319.66 for the time he dissipated the same, which was prior to the receivership.

On the whole there is nothing in the decree of the Circuit Court of Appeals fixing the deficiency judgment at $70,319.66 of which Carter can complain.

THE QUESTION OF ALLOWANCES TO CARTER AND HIS COUNSEL.

These questions are discussed in the brief of Counsel for the United States on the Direct Appeal of the United States from the allowances made by the Circuit Court and affirmed by the Circuit Court of Appeals.

CERTAIN ENGINEERING FEATURES OF THE CASE.

The Appropriations by Congress for Project of June 30, 1890.

The appropriations made for work under the revised or extended project of June 30, 1890, were as follows:

Act September 19, 1890, 26 Stat. L., 431, for:

> "Improving harbor at Savannah, Georgia; continuing improvement on extended project, $350,000."

This resulted in the contract J. F. Gaynor of November 5, 1890. Vol. 22, p. 10037.

Act of July 13, 1892, 27 Stat. L., 92, for:

> "Improving harbor at Savannah, Georgia; continuing improvement, $318,750. Provided: That contracts may be entered into by the Secretary of War for such material and work *as may be necessary to complete the present project of improvement,* to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate $2,831,258, exclusive of the amount herein and heretofore appropriated."

This resulted in what is known as the "continuous" contracts of 1892 for Savannah harbor, let to the Atlantic Contracting Company for jetty work (Vol. 22, p. 10147), and to P. Sandford Ross for dredging and for removal of wharves, etc., as will be presently referred to.

The additional appropriations for carrying out these continuous contracts were as follows:

Act of March 3, 1893, 27 Stat. L., 603:

> "For improving harbor at Savannah, Georgia; continuing improvement, $1,000,000."

Act August, 1894, 28 Stat. L., 404, for:

> "For improving harbor at Savannah, Georgia; continuing improvement, $975,000."

Act of March 2, 1895, 28 Stat. L., 947:

"For improving harbor at Savannah, Georgia; *completing* improvement, $856,250."

It will thus be seen that the total appropriated by Congress for the execution of the project of 1890 for the improvement of Savannah harbor was:

By Act of September 19, 1890	$ 350,000.00
By Act of July 13, 1892	318,750.00
By Act of March 3, 1893	1,000,000.00
By Act of August 18, 1894	975,000.00
By Act of March 2, 1895	856,250.00
	$3,500,000.00

This was the exact amount asked for in Captain Carter's project of improvement of June 30, 1890. (Vol. 26, p. 13361.)

It will be observed that the appropriations were made to cover the work for which estimates were made in the project.

The Work Contemplated in the Project of 1890.

The project of June 30, 1890, for the improvement of Savannah harbor is in evidence and found in the record, Vol. 26, p. 13355. A reference to this project (separating the dredging from the jetty work) shows that it called for certain work estimated to cost:

Dredging	$1,452,150
Jetty work	1,746,250
Possible land damage to Hutchinson Island	45,000
Engineering and contingencies	324,340
	$3,567,740

(1) The amount of dredging estimated for, contemplated the entire or partial removal of certain islands in the river above the city, and the widening and deepening of the river for several miles above the city, so as to give a free flow of

the tide by and past the city from Cross-tides dam, some 4 miles above the city, to the sea, and to give an ebb velocity of about 2 feet per second to secure permanence of channel. (Vol. 26, p. 13357.)

(2) The dredging estimated for contemplated a channel 300 feet wide and 26 feet deep at mean high water from the city water works (above the city) to Vale Royal Mills (above the city). (Vol. 26, p. 13359.)

(3) The dredging estimated for contemplated a channel from 300 feet wide and 26 feet deep at mean high water from Vale Royal Mills (above the city) to Fort Oglethorpe (below the city). (Vol. 26, p. 13359.)

This was a least width of channel at any point, but as we shall presently see that on the main front of the city the channel was to be 600 feet wide and 26 feet deep.

(4) At a point designated as "Obstructions" below Fort Oglethorpe, 250,000 cubic yards were to be dredged so as to give a channel 400 feet wide and 26 feet deep at mean high water. (Vol. 26, p. 13360.)

(5) Below Fort Oglethorpe from Elba Island the channel (with the same depth, 18 feet at low water or 26 feet at high water) was to have a general increase in width from 1200 feet at the head of Elba Island, to 1870 feet at Long Island crossing. (Vol. 26, p. 13357.)

These locations will be better understood by reference to the large map of Savannah River compiled by Captain Carter June 30, 1896, Plaintiff's Exhibit 421, Court Martial, the original of which is sent up for inspection. This map was made after Carter claimed he had completed the project of 1890, and his "legend" thereon states:

> "The area of the 18-foot curve is shaded in red. There is inside of this area a channel of 26 feet least depth at local mean high water, and a minimum width of 240 feet from the city to the sea."

If we examine more closely the project of 1890 (Vol. 26, pp. 359-60) we will see that the estimates were for:

Dredging:

Above cross-tides dam	$ 24,000
Cross-tides to Fort Oglethorpe	595,500
Additional Kings Island	109,500
Fort Oglesthorpe to Oyster beds	279,750
Oyster beds to Tybee Roads	443,400
	$1,452,150

In this dredging of the river channel estimated for, were included "The widening of the unduly contracted region below Kinzey's Point." (Vol. 26, p. 13358.) And this included the cutting off of the front of Hutchinson Island. This will more fully appear by reference to Captain Carter's letter of May 26, 1891, to chief of Engineers, giving a history of the proposed removal of a portion of Hutchinson Island. He there said (Vol. 9, p. 4280):

> "In my revised project of improvement for Savannah Harbor and river printed on pp. 1269-63 of the annual report of the Chief of Engineers U. S. A. for 1890, there is an item of $45,000 for possible land damages to Hutchinson's Island. The project provides for the cutting away of the unduly contracted region below Kinzey's Point, which region is shown on the accompanying blue print as that portion of Hutchinson's Island south of the harbor line of 1889. The approximate location of this harbor line is given in this blue print, the exact location being shown on a tracing forwarded to the Chief of Engineers U. S. Army by a board of engineers in April 1, 1889."

The blue print which accompanied this letter is in the record as Court Martial Exhibit 260, Vol. 27. A still better map of the part of Hutchinson's Island of which the project contemplated the removal, is shown by Carter's map of 1894, Defendant's Exhibit 81, Court Martial (original sent up).

In the specifications of 1892 prepared by Carter for these

improvements, on which both the dredging and jetty work were let,—the dredging to P. Sandford Ross and the jetty work to the Atlantic Contracting Company (Greene & Gaynor), the dredging work contemplated by the project is thus stated, Vol. 22, p. 10154:

> "It is also proposed to enlarge Drakie's Cut; to remove a part of King's Island and the projecting part of the mainland; to remove a part of Marsh Island; to *widen the channel to 600 feet along the city front;* and to deepen the channel by dredging at various points between the cross-tides dam and Tybee Roads."

These specifications further provided in regard to the cutting off of the front of Hutchinson Island, as follows (Vol. 22, p. 10160):

> "Such parts of the pile and timber wharfing and revetment and such parts of the ship railways on Hutchinson's Island as project beyond the bulkhead line established in 1889, will be removed by the contractor and so disposed of by him as not to injure vessels or obstruct navigation. When this timber and other material has been removed, *the shore of Hutchinson's Island will be excavated by dredging to a depth of 26 feet at mean high water and back to the established bulkhead line,* and the contractor will then build on that line, pile and timber wharfing or revetment, which in the opinion of the engineer officer in charge, is equally as extensive, good and desirable in every respect as that removed. The contractor will also alter or repair the ship railways, putting them, in the opinion of the engineer officer in charge, in equally as good and desirable a condition as they were at the time of their partial removal."

In the said specifications (Vol. 22, p. 10168) a bid (separate from the dredging for cutting off the front of Hutchinson's Island and the widening of the channel there to 600 feet, 26 feet deep), was provided, for the removal back beyond the harbor line of 1889 of the ship railways and for rebuilding the wharves on that line.

The contract for the removal of the ship railways and rebuilding of wharves on the new line was let to P. Sandford

Ross as the lowest bidder for $100,000, and he also was awarded the entire dredging work estimated for under the contract 7,000,000 cubic yards at 16 cents, $1,120,000. (Exhibit 182, Vol. 31.)

Besides the above there was as we have already seen an additional sum of $45,000 estimated for, and appropriated for possible land damages to the owners of the frontage on Hutchinson's Island who might be injured by the proposed changes in the actual harbor line.

A consideration of the foregoing will show that the project for which Congress appropriated the $3,500,000, was on an estimate for a channel 26 feet deep, and having widths as follows: Just above the City of Savannah 300 feet wide; along the main city front 600 feet wide; just below the city 400 feet wide, thence widening to the ocean.

Now notwithstanding that Carter did not obtain anything like the above *widths* of channel of the required depth, Judge Kohlsaat, in his opinion of January 9, 1908, Vol. 1, p. 359, says:

> "Two startling facts stand fully proved and practically admitted upon the record.
>
> First. *The work was performed by* Carter *within the appropriation* in such manner as to secure an increased *depth* of the channel of Savannah River, *240 feet* in *width at the bottom,* from Savannah to the ocean, of nine feet, whereby that city became the second city on the Atlantic coast in the volume of its commerce."

The astonishing thing is that the judge found that Carter only obtained a river channel of 240 feet in width of the required depth of 26 feet at mean high water, and that he had spent the entire appropriation of $3,500,000 in doing that much, and that the judge did not comment on the fact that

Carter had fallen so far short of doing the work for which the appropriation was made.

The other startling fact referred to was the alleged tracing of the fund from the contracts to Westcott, and the gifts from Westcott to Carter.

The Work Contemplated for which the Appropriations Were Made Was Not Done.

P. Sandford Ross, who had the entire contract for dredging, and also for the work of moving back of the wharves, etc., on the Hutchinson's Island frontage, a witness for the defense, testified on cross-examination (Vol. 25, p. 12927):

"Q. Mr. Ross, isn't it true that under the dredging contract which you had under what was known as the big project of 1890, that only about two-thirds of the amount of dredging was done that was estimated would be done under the project?

A. Yes, sir.

Q. That is true, is it?

A. That is, including the cutting off of Hutchinson's Island, our contract called for 7,000,000 yards or more or less. Of course that was tentative. Carter claimed and thought they would get a great deal of scour there that might reduce that, but of course I counted we would get it all, and the cutting off of Hutchinson's Island as well, which was at a fixed price, made our contract aggregate something over $1,200,000, and I think we only got about $800,000, which was a very sore point to me.

Q. That left about $400,000, in rough figures, of the amount estimated for the whole project which might be spent in other ways?

A. Yes, well, it was used up for mattress work and jetty work and so forth.

Q. Mr. Ross, was there a scour up in that part of the work which Carter claimed made dredging unnecessary?

A. No, sir; there was not. The scour was—brought down material rather than cut it away.

> The fact was there wasn't money enough to finish the width of the cutting of the channel that we were to make, and it has never been finished yet, either."

But we are not dependent upon the testimony of Mr. P. Sandford Ross, who was Carter's witness, to show that the work contemplated in the project for which the appropriations were made, was not done.

Carter reported June 30, 1896, to the chief of engineers that all the money appropriated had been used, the contracts completed, and the object of the improvement—"that is, the establishment of a navigable channel 26 feet deep at mean high water from the city to the ocean bar—has been attained" (Vol. 4, p. 2047). Notwithstanding this he never claimed, as we have seen, that he had obtained a continuous navigable channel of that depth over 240 feet in width.

Nor is it claimed that he cut off the front of Hutchinson's Island so as to give a channel 600 feet wide in front of the city. Nor did he do the large amount of work above the city for which the appropriations were made to insure the free and rapid flow of the tide which, as the project states, it was necessary to have to prevent the deposit of silt and secure the permanency of the depths to be attained.

In the project of 1890 it is stated (Vol. 26, p. 13357):

> "The results of the survey appear to indicate that a mean ebb velocity of about 2 feet per second is required to secure permanence of the channel. The general aim of the revised project will be to mould the river from cross tides to the sea in such a way as to allow the free ascent of the flood tide and to secure throughout, as far as practicable, the above uniform velocity of ebb flow."

That the widening of the channel and deepening of the channel in front and above the city and generally, which was to have accomplished the above purpose was not done is proved.

And that the above object was not accomplished is shown by the fact that after Carter reported (June 30, 1896) that the

project was completed, he on December 18, 1896, in connection with his project of expenditure for Savannah Harbor, estimated for "maintenance to July 1, 1897, $50,000." (Vol. 5, pp. 2148-50.) That this was for maintenance of the harbor depth by dredging is shown by the endorsement made October 24, 1896, by the chief of engineers on Carter's project for 1896. (Vol. 2, p. 718.)

Captain Gillette, who succeeded Captain Carter, testified in 1903 that during the five years following the alleged completion of the project from $50,000 to $55,000 a year alone had been spent on dredging to maintain the 26 feet depth of harbor. (Vol. 9, p. 4455.)

Carter made no statement in the project of 1890 that any dredging would be needed to maintain the depth after it should be completed. Carter admits this (Vol. 8, p. 4009). He did estimate at the conclusion of his work that it would take $50,000 per year for maintenance. He so testifies. (Vol. 17, p. 8263.)

Carter wrote Col. Peter C. Hains, division engineer, November 28, 1896, admitting that the cutting off of the front of Hutchinson's Island had not been done, saying it was on account of excessive damages demanded by the property holders, and he was insisting that the Hutchinson Island front should yet be cut off. He therein says:

> "It is not practicable without injury to the harbor to get the enlarged cross-section by deepening the river and the relinquishment of the adopted harbor line will work serious injury to the harbor." (Vol. 4, p. 2050.)

But the chief of engineers in his endorsement on this letter, under date of February 15, 1897, pointed out to Carter, that there was then no appropriation available for that purpose, and that Carter's previous reports had indicated that all the work under the project of 1890 for which former appropriations had been made, was completed. (Vol. 4, p. 2051.)

It will be observed that the question as to whether Carter's

excuse for not doing that work was true or false or justified him in not doing it, is a question entirely separate and apart from the question as to whether he did the work for which the appropriations were made or not, and the question as to whether he did not take all the money appropriated for the work he did not do and divert it to Greene & Gaynor for increased quantities of brush mattresses and to the vast enhancement of their profits.

It is admitted that he did use up all the $3,500,000 appropriated. It is admitted that he did not use for the purpose for which it was appropriated the $45,000 appropriated on the estimate for land damages. It is admitted that Ross did not do the $100,000 of work in moving back the ship railways and works. It is admitted that the large amount of dredging estimated for cutting away the front of Hutchinson's Island, so as to get a channel on the main part of the city 600 feet wide and 26 feet deep at mean high water was not done.

By referring to the project it will be seen that the estimate for which the appropriation was made (Vol. 26, p. 13359) was "Vale Royal Mills to Fort Oglethorpe as above 2,000,000 cubic yards dredging, at 15 cents per cubic yard, $300,000." Carter admits that he did not have dredged between those points but 1,189,618.4 cubic yards. (Vol. 18, p. 8733.) This at Ross' contract price of 16 cents would represent in money $190,338.95, a difference for the dredging not done between those points of $109,661.05, which embraced the work of widening the river to 600 feet on the main front of the city.

Here are three items, $45,000, $100,000 and $109,661.05, appropriated for the doing of a work admittedly of the highest importance, which was not done, and the money was used, as we shall presently see, to pay for the large increase of brush mattresses under the Greene & Gaynor jetty contract. This, however, was but a part of the work not done, for instance

(Vol. 26, p. 13359), the estimate in the project for which the appropriation was made was for the partial removal of Marsh Island above the city 500,000 cubic yards of dredging. Carter admits that only 36,920 cubic yards were dredged there. (Vol. 18, p. 8733.)

Carter claims, however, that he did an increased quantity of dredging at certain other points above the estimate, and that he dredged under the entire project 6,037,363.46 cubic yards. Vol. 18, p. 8734.

It must be borne in mind, however, that the project of 1890, Vol. 26, p. 13359, estimates for 9,681,000 cubic yards of dredging, and that the money was appropriated for it.

There were two contracts let to Ross for the dredging under the project of 1890. The first contract was let to him in 1890 on his proposal (Exhibit 262, Court Martial) for "from 450,000 to 500,000 cubic yards" of dredging. The second contract let to him in 1892, as we have already seen, called for 7,000,000 cubic yards.

The fact that large amounts of the dredging which was to accomplish especially the widening of the river was never done is proved beyond question. That Carter never obtained a continuous channel over 240 feet in width, 26 feet deep, is not only shown by the map accompanying his report of June 30, 1896, but by his admission on cross-examination he testified, Vol. 18, p. 8735:

> "Oh, yes, a navigable channel is one wide enough to allow two big steamers to pass and that is about 100 feet. In a great many places we got a great deal more than that, in fact, I think the narrowest part was 240 feet when I completed the project, which was far more than the project required."

That Carter did not complete the work at Savannah for which the appropriation was made, within the appropriation, is overwhelmingly established by the documentary evidence.

What Became of Diverted Money?

Now it is a self-evident proposition that if the $3,500,000 appropriated by Congress to carry out the project of 1890 was all spent on the work by Carter as he reported, and yet a large amount of the dredging estimated for and for which the appropriations were made was not done, and a large part of the work which was estimated for to give the increased width of the channel, and to give free flow of the tide above the city, and for which the appropriation was made, was not done, that the money so appropriated must have been diverted to some other purpose.

The documentary evidence shows that in the contract No. 4960 of October 22, 1892 (Vol. 22, p. 10147), let to the Atlantic Contracting Company (Greene & Gaynor) for doing the jetty work under that project, the estimated amount of mattresses specified for the bidders to bid on was only 350,000 square yards, and that under a clause of the specifications allowing the engineer *the discretion* to increase or diminish the relative quantities of material, Carter allowed Greene & Gaynor to put in 1,363,572.36 square yards of brush mattresses. (Exhibit 174, Vol. 31.)

This was an increase of 1,013,572.36 square yards of mattresses over the amount estimated for canvassing bids, or at the contract price added $962,893.74 to the amount paid Greene & Gaynor for brush mattresses over the amount bid for by them.

And whereas the amount of material specified on which Greene & Gaynor bid, made their bid for jetty work only $1,686,500. (Exhibit 182, Vol. 31.) They were actually paid on their jetty contract $2,110,869.46. (Exhibit 217, Vol. 31.) This was an increase over the gross amount bid by the contractors of $424,368.46, but it tells but a small part of the story

as to vast profits added by reason of this exercise of Carter's discretion.

A portion of this increase in the amount paid Greene & Gaynor for brush mattresses, was accomplished by Carter's exercise of the discretion that he claims was reserved to him in the specifications of increasing or diminishing the relative amounts of material used over the amounts stated in the specifications to be bid on. Thus the amount of stone stated in the specifications to be bid on, at the prices stated in the Greene & Gaynor bid, made their bid for stone $720,000. (Exhibit 182, Vol. 31.) But after the contract was let the amount of stone put in at the contract price was only $376,904.60 (Exhibit 175, Vol. 31). This left $343,095.40 of unused stone money diverted to the payment of the increased quantity of brush mattresses. The balance, $619,798.34, paid out for the increased quantity of brush mattresses, necessarily came from the dredging and other work, for which appropriation had been made, but which was not done.

The fact of this exercise of Carter's discretion in this vast increase in the quantities of brush mattresses after the contract was let over the amount estimated for in the specifications is admitted, and it was so found by the Circuit Court (Vol. 1, p. 369) and by the Circuit Court of Appeals. (Rec. Vol. 33, p. 13423.)

Now one of the special averments of the bill in regard to the scheme devised between Carter and the contractors to defraud the United States which it is averred was put in operation under the contracts in question and particularly under the big contract of 1892 for Savannah Harbor, was (Vol. 1, p. 5), that:

> "Said Oberlin M. Carter as such engineer officer in charge as aforesaid should in drafting the specifications for contracts to be let for jetties, spur-dams and training walls in said Savannah District, would specify so vaguely and so uncertainly set forth the character, quality, *quantity*, description and design of the material to be used

in the work (a) that when the material was furnished by the contractor under such contracts as should be so fraudulently obtained for the benefit of said conspirators as aforesaid the said specifications could and would by a fraudulent, strained and lax construction to be placed upon the same, by said engineer in charge, be made to apparently justify the acceptance and approval which he would make for payment at such high and exorbitant prices, of large quantities of material of very poor and cheap quality, description and design, and of very small value to the United States."

In a suit for relief from fraud it is enough if the facts found are not substantially different from those alleged in the bill.

Tufts v. *Tufts*, 123 U. S., 76.

We will pass over for the present the fact that the 350,000 square yards of mattresses specified for, called for a bid at the same price for each of three designs of mattresses, one of which had only cost half the price of the other in contracts let previous to 1891, and left it to the discretion of the engineer to select after the contract was let, which design he would use, and we will pass over the fact that all of the 1,363,572.36 square yards of mattresses put in were of the cheapest brush design, and consider for the present only the discretion of the officer exercised in the increase in the quantity. The fact that the specifications fixed 350,000 square yards of mattress as the quantity estimated to be used and to be bid on, appears from the specifications themselves (Vol. 22, p. 10163). The fact that Carter prepared these specifications and sent them for approval appears from his letter to the Chief of Engineers of July 18, 1892, inclosing the draft of the specifications, and the indorsement thereon showing that they were approved by giving Carter authority to print and advertise them (Vol. 3, p. 1459).

The fact that the specifications as prepared by Carter after stating the quantities to be bid on then contains this clause:

> "But the foregoing quantities are liable to be increased or diminished as may be found necessary"

appears from the specifications themselves (Vol. 22, p. 10163). And the further provision in the specifications under the head of "supervision" (Vol. 22, p. 10164).

> "He (the engineer officer), will if he thinks proper be at liberty to increase or decrease the relative quantities of all material, after due notification to the contractor without any change in the contract prices."

This in itself was not an unusual provision in government contracts for the purpose of covering changes in the relative quantities of the material within reasonable limits, arising out of the ordinary exigencies of the work, of course conforming in the thing taken of any kind, to the kind specified and bid on. But construed as Carter construed it, it not only rendered the quantities specified vague and uncertain as charged in the bill, but he claims under this clause to justify himself in accepting nearly $1,000,000 of brush mattresses in excess of the amount specified in canvassing bids, and the right to divert at least $619,798.34 appropriated for other purposes included in the Ross contract into brush mattresses under the Greene & Gaynor contract, besides converting $343,095.40 specified for stone work under the Greene & Gaynor contract into brush mattresses. This exercise of discretion claimed by Carter, changed fundamentally the project under which the contract was let. It not only left undone a large part of the improvement provided for by the appropriations for the project, but as we shall presently see it built up a great jetty with nothing but brush mattresses held down by a small quantity of stone on the top, instead of a jetty as specified built up of alternate layers of stone and of mattresses (log or brush); and this was done, as we shall presently see, by the use of a multiple mat not specified for at all, and upon which no competitive bids had been obtained. That no such power was really intended to be vested in the engineer officer in local charge is shown by the following provision in the said jetty

contract, No. 4960, itself (Vol. 22, p. 10171), as approved by the Chief of Engineers:

> "If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications *as to character and quantity, whether of labor or material,* as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, *and before taking effect must be approved by the Secretary of War.* Provided that no payments shall be made unless such supplemental or modified agreement *was signed and approved* before the obligation arising from such modification was incurred."

It will be observed that "the cost of the work" above referred to was the cost of the work to be done *under the jetty contract* in which this clause occurs, and it is admitted that the changes made by Carter increased the amount of work done under this jetty contract as a whole by the amount of $424,369.46, as we have already seen.

Carter claims also to justify himself in changing from the single mattress specified to the multiple mat put in but not specified in the specifications or bid on by other bidders, under the following clause of the specifications which occurs immediately after the description of the three designs of mattresses, to wit (Vol. 22, p. 10156):

> "*The United States* reserves the right to make such alterations in the details of construction, or in material, as may be deemed best during the progress of the work, providing that should such alterations materially vary the cost of the mattress, the price to be paid shall be increased or diminished proportionately, such change of price being agreed upon before the alterations in the mattress are made."

But the power given *The United States here,* is by the ex-

press terms of the contract as above noted reserved to the Secretary of War, and was not vested in Carter as engineer officer in charge. He could recommend only. It is charged in the bill (Vol. 1, p. 3), that Carter was vested

> "With power, duty and discretion in from time to time approving modifications of such contracts and suggesting to his superiors the adoption of such modifications."

In Carter's answer to the bill (Vol. 1, p. 126), he says:

> "He denies that he was vested with power, duty or discretion in approving modifications of contracts; but he admits that it was his duty to suggest for the consideration of his military superiors any modifications which seemed to him advisable, but he was governed entirely by their orders in the matter.'

The law placed this power in the Secretary of War. The Act of August 11, 1888, carried into Sup. R. S., p. 610 (See Main Brief, p. 122) gave the Secretary of War the power to accomplish the work by contract or otherwise, but when let by contract it was to be after sufficient public advertisement.

It would of course reduce the whole method of making government contracts to an absurdity, to suppose that it was required that the projects for improvement and expenditure, the specifications for the details of the material and work, and the details of the contract itself, each and all had to be approved by the Chief of Engineers or Secretary of War, and then suppose that the local officer could depart from them as he saw fit without getting the sanction of the superior officers whose approval was necessary to adopt these details in the first instance. General Gilmore, who was Carter's predecessor in charge of the Savannah district, thought that a change even from a log mattress specified to a brush mattress, where the engineering conditions required it, required a supplemental contract approved by the Secretary of War. See his letter to Carter of April 17, 1885 (Vol. 23, p. 10755)

and his supplemental contract approved by Secretary of War (Vol. 22, p. 9921).

Carter Did Not Call the Vast Increase in Quantity of Brush Mattresses to Attention of His Superior Officers.

It is admitted by Carter that he made no special report to the Chief of Engineers or Division Engineer of this immense increase in the quantity of brush mattresses used over the amount specified in the contracts. He claims, however, that they were put on notice of it by him in two ways:

1st. By his monthly reports of operations.

2nd. By his annual reports, made for publication in the annual report of the Chief of Engineers.

Samples of the monthly reports of operations (see Vol. 9, 4255 to 4260, and also Vol. 26, pp. 13169 to 13187) are in evidence, and an examination of them will show that no monthly report in itself shows how many mattresses had been put in under the contract up to or including such monthly report, and the very form of the report shows that it was not intended to convey information to his superiors as to whether there had been any material used in excess of that specified. No reference is made to the amount of the different kinds of material specified in the contract. To find out even the number of mattresses put in during the month, the number put in at various points would have to be picked out and added up. And there is no bringing forward from month to month the amounts of material previously put in. No word is said in any of these reports that he had exceeded the quantity of mattresses specified in the contract.

If this court will look at one or two of these monthly reports of operations to which we have referred, it will see that Carter's contention that the Chief of Engineers was put on notice

of the fact he had exceeded the quantities of mattresses specified in the contract specifications, is unfounded.

Carter, when questioned about this on cross-examination, testified Vol. 18, p. 8842:

> "Q. But there would be nothing in any monthly report standing by itself, from which a man could tell how much material had been used under the contract up to that month?
>
> A. No, we are prohibited from doing that; nor would the financial statement, that was not furnished to the Division Engineer, as I remember now, as I recall it that was prohibited, and such information was sent direct to the Chief of Engineers."

There is no evidence that there was any such prohibition against bringing forward the amount of material previously put in under the contract, but if so it shows, as does the fact that it was not required, that those reports were not intended to furnish information to check up the amount of material put in as against the amounts specified.

Col. Peter C. Hains, who was Division Engineer during the execution of the 1896 contracts, testified in answer to a question put by Carter (Vol. 2, p. 688):

> "Q. You were asked, Colonel, if it was proper for me to have increased the amount of mattress from 350,000 square yards to over 1,000,000 square yards without the knowledge of the Chief of Engineers. Suppose that were reported in writing to him and to the Division Engineer every month, is not that a sufficient notification?
>
> A. I should say not, because a report of that kind would not be noticed if it was in the 'Report of Operations,' such a report would not be noticed."

Gen. W. P. Craighill, who was Division Engineer during the execution of the 1892 contracts, testified as a witness for the defense (Vol. 2, pp. 904-5):

> "Q. Did you at any time while you were Division Engineer have any reason to suppose that Captain Carter exceeded the quantities specified in the specifications?
>
> A. I did not."

Now as to the alleged claim that the Chief of Engineers was put on notice of the excess quantity of mattresses used by Carter's annual report, printed in the annual reports of the Chief of Engineers.

These Annual Reports are printed for general information like Patent Office reports.

There is nothing in these annual reports which calls attention to the fact that Carter had exceeded the quantities specified in the specifications and contracts. The quantities which had been specified are not stated or referred to in the same report in which the amounts put in are stated. All that appears from the extracts put in evidence by Carter, is that he does state the quantities put in. Thus he reports for Savannah Harbor:

Vol. 4, p. 1952: Put in to June 30, 1893, mattresses, sq. yards, 240,708.95.

Vol. 4, p. 1952: Put in to June 30, 1894, mattresses, sq. yards, 699,536.65.

Carter, questioned by the Board, testified (Vol. 2, p. 567):

"Q. When you had reached the 350,000 sq. yards did you notify the Chief of Engineers?

A. No, sir.

Q. Did you notify him at any time?

A. I don't think I have notified him directly.

Q. You assumed that the specifications were so elastic, that you could provide any quantity of material, and dispose of it any way you thought fit, provided you didn't exceed the sum appropriated by Congress?

A. Provided it was to the interest of the United States; and provided it didn't increase the cost."

We have seen that the Division Engineers under the 1892 and 1896 contracts testified as matter of fact they did not

know it, and that the Chief of Engineers, Craighill, under the 1896 contract, did not know it.

Gen. Casey, Chief of Engineers, during the 1892 contract was dead, as the record shows, at the time of the court martial trial, but we have Carter's admission before the Board that he had not notified him of it directly.

Capt. Frederic V. Abbott of the Corps of Engineers (now Col. Abbott), questioned by Carter, testified (Vol. 2, p. 818):

> "Q. You were asked, some time ago, if it was proper to increase the quantities, without the knowledge of the Chief of Engineers. As a matter of fact the increase in quantities was reported in writing to the Chief of Engineers and to the Division Engineer each month, and the Division Engineer and Chief of Engineers were made further orally acquainted with this change, knowing this do you think then it would be necessary further to get any specific authority from the Chief of Engineers for such change?
>
> A. I should have made a special report myself of any considerable change in relation to it. At Charleston the stone fell short 25,000 tons on a 525,000 ton contract. I did not think it necessary to report that."

Counsel for O. M. Carter in their Main Brief on the Evidence, p. 118, quote Captain Abbott as follows:

> "I should consider that not receiving orders from the Chief of Engineers was equivalent to an approval."

This extract is taken from Captain Abbott's testimony before the Board. (Rec., Vol. 2, p. 816.)

The said counsel failed to quote the antecedent questions, which show that the answer was predicated upon the hypothetical premise that the Chief of Engineers already had a personal knowledge of the fact that the large increase was being made; the said premise being (Vol. 2, p. 816):

"But would you consider that you could do it without the authority of the Chief of Engineers *if he knew it?*"

Now the testimony of the Division Engineer and of the Chief of Engineers is that they did not know it, as we have already seen.

It was this garbled statement of the evidence however which caused Judge Kohlsaat to make the error on this point we shall presently point out.

Capt. W. M. Black of the Corps of Engineers (now General Black) testified (Vol. 2, p. 695):

"Q. The specifications say that the quantity of mattress work required for canvassing bids for Savannah Harbor (1892 contract) would be 350,000 square yards, had you been the constructing officer, would you have thought it right and proper to increase the quantity to 1,360,000 square yards, the quantities of other required materials being correspondingly reduced?

A. No, sir.

Q. Would you have deemed it sufficient to have made a report of this increase by a monthly report alone, or would you have deemed it necessary to make a special report direct to the Chief of Engineers upon this subject?

A. I should have deemed it a radical departure from the terms under which the contract was let and therefore requiring special authority."

Capt. Black, besides having been in charge of the Florida District, was also an officer thoroughly acquainted by reason of his having been on the office staff of the Chief of Engineers in Washington (Vol. 13, p. 5993) and knew that the monthly reports of operations, stating only monthly quantities put in, were not intended or calculated to put the Chief of Engineers on notice of the increase beyond the contract specifications.

The foregoing testimony in regard to Carter's failure to

report to the Chief of Engineers, the vast increase in the quantity of mattresses, has never been met by any testimony on part of the defense. This increase was not alone in the Savannah Harbor contract, but ran through all the Greene & Gaynor contracts, during the period when one-third of the profits of the contracts are shown to have gone directly or indirectly to Carter. This is shown by Exhibit 174 (Vol. 31), as follows:

Quantities of Mattresses Used to Canvass Bids Compared with Quantities Actually Used.

Contracts.	Square yards used to canvass.	Actually put in.
4960 Sav. Harbor, 1892,	350,000	1,363,572.36
4820 Cum. Sound, 1892,	80,000	107,734.92
5811 Cum. Sound, 1894,	50,000	213,334.11
6517 Cum. Sound, 1896,	200,000	446,102.41
6515 Sav. Harbor, 1896,	200,000	255,830.43

The last two contracts had not been completed when Carter left the District, but before he left he had already left written orders for putting in 534,307.61 square yards for the 1896 contract at Cumberland Sound (Main Brief, p. 283).

Judge Kohlsaat's Finding on the Question of Increase in Quantity.

Judge Kohlsaat confines his discussion on this subject to the 1892 contract for Savannah Harbor. He finds the fact of the increase as contended by complainant. He says (Vol. 1, p. 369):

> "Under the power reserved in the contract authorizing the engineer to vary the relative amount of each, Carter

increased the amount of mattresses to 1,363,572 square yards, to the practical exclusion of the other materials above enumerated."

But he says:

"For defendant it is insisted that the frequent reports showing the progress of the work, advised the Department of what was being done, which was all that was required.

It is not denied that the substitution appears fully in these reports.

In and of itself, no improper motive can be deduced on Carter's part, from his course in this respect.

The failure of the Department to call attention to the change *might be* fairly assumed to indicate approval."

Now the learned judge there makes a serious blunder in stating that it is not denied that the substitution appears fully in these reports. The fact that the increase in quantity of mattresses beyond the amounts specified was not called to the attention of the Chief of Engineers and Division Engineer by said monthly reports was not only shown by the evidence to which we have already called attention, but it was called to the attention of the learned judge and insisted on in the brief before him, which is the same as Main Brief, pp. 311-12, in this court.

Again, if any of Carter's superior officers should have been apprised by Carter's monthly reports of operations, that he had exceeded the quantity of mattresses estimated in the specifications, that officer would be the Division Engineer, who was more directly in supervision of the engineering work, than the Chief of Engineers himself. And yet we have, as already seen, the testimony of Gen. Craighill as a witness for the defense, who was the Division Engineer under the 1892 contracts and later Chief of Engineers, that he did not know of it, that it was never called to his attention. And we have the

testimony of Col. Hains, Division Engineer in 1896, that he did not know it, and that the monthly reports were not sufficient to call attention to it.

How, then, can the failure of the Department to call attention to the change be fairly assumed to indicate approval?

But even if the increase had been so approved, by acquiescence, it would not have relieved Carter if his motive in making the increase was to add to the profits of the contractors, in which he was to share.

Again, there is no finding here by the judge that Carter's motive was not corrupt, when taken in connection with the other facts of the case. His finding is:

> "*In and of itself*, no improper motive can be deduced on Carter's part, from his course in this respect."

Well, no one, certainly not the complainants nor the Attorney General, nor any court which has expressed any opinion on the subject have ever contended that the increase in the quantities of brush mattresses, *in and of itself* was sufficient to show a corrupt motive. But that fact, and the fact that it vastly increased the profits of the contractors, taken in connection with all the other facts in the case, and especially with the fact that Carter is shown to have been the beneficiary of a third of the profits under that and the other contracts in which the increases were made, does furnish the corrupt motive. But the learned judge at that point of his finding certainly does not pass, either affirmatively or negatively, as to whether the whole evidence is sufficient to show the corrupt motive.

Again, however, after considering other features of the engineering work, the learned judge says (Vol. 1, pp. 379-80):

> "The evidence leaves the court with the impression that there was carelessness in the manner in which some of the work was done, indeed carelessness for which Carter was justly entitled to be criticised, but considering the

material results, the magnitude of the work, *and assuming the absence of any mercenary* or ulterior motive on Carter's part, except such as might be deduced from facts *so far considered.* I am of the opinion, as was Senator Edmunds, in the court martial case, that Carter's course in the premises was not *necessarily* an abuse of the discretion vested in him, nor seriously inconsistent with his claim that he discharged his duty to the Government, and that, *limited as above stated,* under the rule of evidence obtaining in such case, the Government has failed to maintain its case.

It is, however, the contention of counsel for the Government, that the foregoing facts should be considered in their relation to the evidence introduced herein to support the charge that the moneys with which the securities, and other property in suit were purchased, were paid to Carter or to R. F. Westcott, his father-in-law, for him, with his knowledge and connivance, by the contractors, as his proportion of the moneys by him fraudulently allowed to the contractors, as it is claimed, on said contracts, in excess of a fair and reasonable consideration for the work actually done by them under the several contracts in question. This evidence, in its present state, was not before Judge Edmunds when he reviewed the finding of the court martial."

The private report of Senator Edmunds to the Secretary of War in 1898, to which reference is above made, was paid for by O. M. Carter. But even that report held that the irregularities committed by Carter, through which the profits of the contractors had been so enormously increased, were such that Carter should be removed from office. He, however, failed to find that any part of the profits had been up to that time traced to Carter to indicate a corrupt motive. The division by thirds was a subsequent development. (See Main Brief, p. 835.)

A careful consideration of the above will make it appear, that Judge Johlsaat had not up to that point decided anything further than that the engineering features of the case which he had reviewed, *considered apart from the evidence of the financial transactions* were not sufficient to show that Carter's

acts and the exercise of his discretions which resulted in exorbitant profits was done from corrupt motives. So far he neither decides it on the whole evidence, affirmatively or negatively.

But then he follows this with a review of the financial transactions, and follows it with this finding (Vol. 1, p. 382):

> "Suffice it to say that without passing *directly* upon the questions as to whether Carter had actual knowledge of, and connived at this raid upon the Government, *the facts brought out* concerning these financial transactions are such that he must, as a conclusion of law, be held chargeable *with knowledge* of what was being done in the premises."

He then follows it with the conclusion that the Government is entitled to recover from Carter or Westcott or any other person holding under either of them with notice, all property traced from the profits of the contracts in question.

The curious part of this last finding, is in the use of the words "without passing directly," which carries with it the implication that he did intend to pass upon the question of Carter's knowledge and connivance *indirectly*, when he follows it with the finding that

> "The facts brought out concerning these financial transactions are such that he must, as a conclusion of law be held chargeable with knowledge of what was being done in the premises."

We think that the learned judge expressed an opinion on a mixed question of fact and law, viz., that the evidence of the financial transactions supplied the "mercenary motive," which, as he had pointed out, the engineering features of the case *considered by themselves* had not shown, and that the rules of law applied to such facts, viz., that Carter was receiving directly or indirectly a third of the profits, made Carter chargeable with a knowledge at the time the acts were done, that he had by the exercise of his discretions, and his

acts which created the vast profits of the contractors, been doing a great wrong and injury to the Government, from which a court of equity would not allow him to profit.

Certainly this finding cannot be construed into a finding that he was not in actual conspiracy with the contractors. At best all that could be claimed for it, is that it does not make a distinct finding of fact that Carter was such conspirator, but finds it indirectly as a proposition of law applied to facts found.

We think it does not vitiate the conclusion reached by the court that Carter cannot hold these assets derived from such profits. But we think the finding of the court should have been clear and unequivocal on this point as a finding of fact, and we made this the ground of our 1st assignment of error, on appeal to the Circuit Court of Appeals, and we therein said:

> "This is not a case in which a court should use equivocal language in order to keep from denouncing a plain case of fraud.
>
> In the interest of an honest administration of the Government and of justice Captain Carter should not be allowed to pose before the country as a second Dreyfus, where the facts make out a plain case of fraud."

This was met by the finding of the Circuit Court of Appeals (Rec., Vol. 33, p. 13426) that,

> "The evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Captain Carter."

DEPARTURE FROM THE SPECIFICATIONS IN THE CHARACTER OF THE WORK PUT IN.

The Three Designs of Mattresses Specified.

The specifications for all of the large jetty contracts let in the Savannah District commencing in 1892 and running through to 1897, called for three designs of mattress to be bid on at one price, and the kind to be used to be at the option of the Engineer. This combination at one price, and the selection afterwards at the option of the Engineer, was an innovation, on the method theretofore pursued under Genl. Gilmore and under Carter, and it is not shown that it was ever done in any other engineering district by any other officer. (Main brief, p. 259.) Taking specifications for contract 4960, the big contract for Savannah harbor of 1892, as an illustration, it will be seen (Vol. 22, pp. 10155-6) that there are three designs of mattress described:

The Third Design, consisting of a layer of closely compacted fascines held together between an upper and lower grillage of poles, the poles of the grillage being spaced from 4 to 8 feet apart.

(See illustrative drawing, Exhibit 191, Vol. 31.)

The Second Design, being in general form the same as the third design, *except it has an additional fascine laid every six feet apart* across the first layer of fascines.

There are also some slight variations in the description of the poles and of the fascines which will be commented on later.

(See illustrative drawing, Exhibit 190, Vol. 31.)

The First Design, being a raft of round logs, of the average diameter of 12 inches, placed in close contact, and held together with transverse binder poles, and upon the raft of logs

a layer of live wood brush sufficient to give six inches in thickness of brush "in the finished work."

(See illustrative drawing, Exhibit 192, Vol. 31.)

The Drawings.

These drawings were not made to scale, but correctly illustrate the form of construction of the mattresses. Testimony of A. S. Cooper, Carter's assistant engineer, who was in charge of the work, and who made the sketches (Vol. 23, pp. 10909-10), Major Gillette (Vol. 23, pp. 10809-49-50, 10870).

Col. W. H. Bixby, witness for defense, testified as to Exhibit 191, the drawing of the third design mattress (Vol. 18, p. 8603):

> "Q. On the other hand in the drawing, the vertical scale is not the same as the horizontal scale there, in other words, the drawing is not drawn to scale?
>
> A. No; evidently not drawn to scale.
>
> Q. But that is not the point I am getting at; as to the form of construction of the mattresses there, the drawing indicates, as I understood, the general way of building up the binder poles and fascines into mattresses?
>
> A. It *fairly* represents that, so one could understand how the mattress was built, and shows quite plainly the way in which those mattresses are made, as explanatory to the text of the specifications."

To like effect is Bixby's testimony as to Exhibit 190, the drawing of the second design mattress. (Vol. 18, pp. 8597 to 8601.) To like effect is Bixby's testimony as to Exhibit 192, the drawing of the first design, log and brush mattress. (Vol. 18, pp. 8607-8.) Some criticisms are made by some of the defense witnesses as to the drawings, but on cross-examination, the criticisms disappeared. (See main brief, p. 243.)

The Single Mat, To Be Put In One at a Time, With a Layer of Rock on It, Is What Is Called for in the Specifications, and What Everybody Bid On.

The specifications after describing the three designs of mattress say (Vol. 22, p. 10157):

> "*No mattress* will be accepted until properly placed in the work and secured there by a layer of stone of such thickness not exceeding one (1) to two (2) feet, as may be required by the Engineer Officer in charge."

The specifications also provided that the contractor should arrange on the mattresses, the necessary beckets for towing the mattresses, and also range masts, for the purpose of aligning the mattress on the jetty for sinking, etc. The language used is (Vol. 22, p. 10156):

> "Towing beckets, buoys, and lines, and range masts must be placed as directed."

Capt. C. E. Gillette, witness for the Government, testified that the mattress which was called for by the specifications was a single mat (Vol. 23, p. 10874), and that the multiple form of construction as he saw it actually going into the work did not conform to the specifications. (Vol. 23, pp. 10877-8.)

Major C. McD. Townsend, who testified as an expert witness for the defense, testified under cross-examination (Vol. 25, p. 12246):

> "The only way to absolutely conform to this third design, would be to build single mats, covered with stone, and then another and cover it with stone. That would be the literal reading of that specification."

Townsend testified that the engineer could not have required

the contractor under Carter's specifications to put in the multiple mat. (Vol. 6, p. 2981-2.)

To the same effect is the testimony of Col. W. T. Rossell, expert witness for the defense. (Vol. 6, p. 2999.)

Lyman E. Cooley, expert engineer, witness for defense, testified that the theory of the Carter specifications was that each mattress as specified in the contract was to be sunk singly with the stone put on the top of each to the depth of 1 to 2 ft. (Vol. 18, p. 8577.)

O. M. Carter testified before the Court Martial as to the manner in which the single mats had been sunk prior to the change to the multiple mat, as follows:

> "Well, the way that came about was as follows: Mattresses had been built on what are known as ways, and then launched into the river and towed in the water to the works. The free flotation of a brush mattress is very low and it became necessary in towing those mattresses very often to take casks or dry logs, or something which would float very well, and place alongside of them, so that they could be towed to the place of sinking, and notwithstanding that, sometimes it would be difficult to get them in place. That work was carried on in that way, the mattress being brought to the place, and then being held by lines until the range markers on the mattresses could be brought into line, the line on which it is desired to sink the mattresses. A small load of stone was then thrown from the barges placed on either side of the mattress, and when in the opinion of the inspector enough stone was placed thereon to sink it, the lines were slackened and the mattress was lowered down within a short distance of the bottom; then ranged in position and the line slackened instantly so that the mattress might settle

into place; then on top of that another similar mattress was placed and on top of that another, and so on, until the desired height was obtained." (Vol. 7, p. 3595.)

And see photos of single mats afloat (originals sent up).

Dft. Exh. 54, Ct. M. identified (Vol. 7, p. 3633).

Def. Exh. 72, Ct. M. identified (Vol. 7, p 3636)

Carter testified further that he had to put a load of stone on each single mattress to get them in place:

"And a careful examination of that work showed that we were not getting much vertical height, although we were spending a great deal of money, and of course it worried me greatly because I feared I would not be able to carry out the work within the limits of the appropriation."

He then gives his reasons for adopting the multiple mat. (Vol. 7, p. 3596.)

Carter further testified before the Court Martial (Vol. 7, p. 3598):

"Q. Beginning under the contract of 1892, as I understand you, you made mattresses gradually increasing in height until 1897?

A. No; I built mattresses of greater thickness under the contract of 1892 than I did under the contract of 1896. You see, the idea, in the Savannah river was *to build the entire dam at once, if I could,* so as to get no more stone on it than was absolutely necessary; so I built the *number of courses* necessary to bring it up to the height I desired, if I could do it."

Carter testified (Vol. 18, p. 8771):

"The instructions were that the height (of the multiple mats) should be the same at the two points (Savannah harbor and Cumberland Sound), but in the 1892 contract the heights at Savannah were greater on account of a different arrangement of grillage poles, as I have explained."

Major W. M. Black questioned by Carter, testified (Vol. 2, p. 702):

"A. I consider that type of mattress (multiple mattresses) totally different from the mattress authorized.

Q. That is not the question I asked, I asked this: Whether it would be necessary to agree upon another cost, another price when there was no change. It was asked, was it right to agree to this, to permit this, to go ahead without an agreement as to the reduced cost when there was no reduced cost? Suppose there was no reduced cost, would that agreement have been necessary?

A. If the agreement as to price was if there were any change in cost, no modification of the contract might have been necessary; but as the method of construction of the jetty was radically changed, authority for such modification from the Chief of Engineers would have been necessary."

Notwithstanding the above testimony of Townsend and Rossell, witnesses for the defense, Judge Kohlsaat, in his opinion (Vol. 1, p. 373), says:

"Col. Hanbury, Corps of Engineers, was of the opinion that Carter's change to the multiple mats was within the specifications, Major Mahan, Col. Marshall, Col. Willard, Col. Rossell, Major Townsend and Major Rees all assert the same."

Col. Willard's testimony is found Vol. 6, p. 3091 to 3109. He was not asked about it and did not testify as to whether the multiple mat conformed to the *specifications* or *contract*. His testimony was on the question of advertisements, on fascines, and on whether the putting in of six courses of multiple mats at Cumberland Sound would vary from the project.

Col. Hanburg testified (Vol. 7, pp. 3506-7):

"I will ask you if that contsruction of mattress (multiple form) was a departure from the specifications of that contract in your opinion.

A. I should not think so. I should think it was perfectly within the province of the Engineer in charge, if he thought that construction would be best for the purpose under the contract, to authorize it to be done, *provided* the cost to the United States was no more than what was originally intended—originally specified."

Major Mahan testified (Vol. p. 3056):

"Q. I will ask you if in your opinion as an engineer, is the multiple mat such as I have described, a departure from the specifications or is it within the discretion of the Engineer?

A. I should say that was a question which was entirely within the discretion of the Engineer.

Q. (p. 3071.) Do you think a person with ordinary intelligence could see that multiple mattresses could be used?

A. Yes."

Major Wm. L. Marshall testified (Vol. 7, p. 3176) he never saw a specification for a fascine mattress prior to Carter's case.

He testified (Vol. 7, p. 3177) he would not call attention of Chief of Engineers to multiple mat *unless there was a difference in cost* and he would make a careful investigation.

Rees testified (Vol. 6, p. 2877):

"Q. You understand them (the specifications) to indicate to a bidder the right to use multiple mattresses, omitting part of the grillages?

A. There is nothing said about it. * * *

It is allowed by the clause of the specifications which authorizes the officer to exercise discretion in certain respects, and inasmuch as it is not stated whether they should be put in singly, or in a number of courses, it seems to me, the multiple element is neither required nor forbidden."

Col. Ludlow, witness for defense, differed from Rees and Mahan, and testified the change should be reported (Vol. 6, p. 3008).

For a brief description of the construction of the "multiple mat" as put in the work by Carter as testified to by the Government witnesses and by the witnesses for the defense, see Main Brief, pp. 250-1-2. A comparison of that description with the description of Carter's 3rd design mattress in the contract of 1892, No. 4960 (Rec., Vol. 22, p. 10156), of which Carter claims it was a mere modification within his discretion,

taken in connection with the provision as to the mattress therein specified that:

> "No mattress will be accepted until properly placed in the work and secured there by a layer of stone of such thickness, not exceeding one (1) to two (2) feet, as may be required by the Engineer officer in charge,"

will show that to build up on the deck of a scow, a multiple mat composed of eight to twelve of the single mats specified, with two-thirds of the poles omitted; to wire the whole together, and to dump the whole as one structure into the jetty, without placing the rock as specified on each of the single mats as required, but placing only a small quantity of rock on the top of the whole structure; while at the same time paying to the contractors for each layer of the multiple mat as if it were a complete single mat placed in the jetty singly as required by the specifications, makes such a multiple mat a structure wholly variant from the mattress specified.

The substitution by Carter of such a multiple structure for the structure specified, being admitted by him, we think that the fact of its departure from the specifications, is a matter dependent upon the legal interpretation of the specifications and contract, and a matter to be determined by an inspection of the contract itself. Whether the change is a radical departure from the specifications is one thing, but the question of whether he had the discretion to make the change, and whether, if he did or did not have, it was or was not fraudulently exercised is another.

In the criminal case against Greene and Gaynor, the court charged the jury that on that point there was no ambiguity about the contracts. On that point, the court construing the contract, charged them as a matter of law that the multiple mat which the defendants admitted that they had put in, was a departure from the third design of the specifications, but they should consider all the evidence on that subject to see if the departure was made without criminal intent.

U. S. v. *Greene,* 146 F. R., 852-3.

On the subject of criminal conspiracy and fraud we think that view is the correct one.

The Effect on the Contract Prices.

Capt. Gillette testified that the log mattress specified could not have been handled by the contractor in multiple form and that all bidders who did not know which design the engineer would select would have to bid on the idea of handling and sinking every mattress singly. (Vol. 23, p. 10903.)

Col. Bixby, witness for the defense, testified that the Bixby Winyaw Bay mattress corresponded very nearly to Carter's second design mattress (Vol. 18, p. 8601) and he testified (Vol. 18, p. 8649):

> "The Winyaw Bay mattresses could not well be laid in place at Winyaw Bay, what I was thinking of, on top of each other at once, they could not be put in together, they would have to be laid separately."

The same thing applies to Carter's second design mattress, because it, like the Winyaw Bay mattress, has the extra layer of fascines spaced 6 feet apart on top of the compact layer of fascines. Bidders were, therefore, forced to bid on the idea that they might be called upon to furnish every mattress singly.

Saving of Cost to Contractors by Multiple Form.

Capt. Gillette testified (Vol. 23, p. 10902):

> "If you make these little brush mattresses with less brush than there was on top of the logs, and pile them up on your lighter and dump them, six or eight at a time, into the sea, making one trip with your stone lighters and tow, the saving over going six or eight trips with a heavy log mattress is something enormous in proportion to the total cost."

The difference in cost between paying for mattresses made in layers put in together as one mattress when paid for by the square yard for each layer, and when paid for by the square yard for the top surface of the whole mattress is illustrated by the following testimony of Col. Bixby, witness for the defense, on cross-examination.

Col. Bixby testified (Vol. 18, p. 8633) that the drawing with the legend thereon Exhibit 332, Vol. 31) is a fair representation of a mattress made in three courses as prescribed in General Gilmore's specifications as a third design for a Charleston, S. C., mattress in 1881, on which the contract was let for 82 cents per square yard for the whole mattress.

He testified (Vol. 18, p. 8642) that the drawing with the legend thereon (Exhibit 331, Vol. 31), fairly represents the form of a *two-course* multiple mattress, built by Carter as described by the witnesses. (See description of multiple mat as described by counsel for defense, main brief, p. 350.)

Bixby testified (Vol. 18, p. 8635):

"The mere amount of material in brush is not all there is to it, but approximately so far as brush is concerned, that brush mattress of three courses (Charleston mat) would have as much brush in it as three fascine layers, of fascines originally choked to 9 inches, roughly and approximately.

Mr. Stone: Would it be used for the same purpose?

The Witness: It might and might not; probably it would *amount to pretty nearly the same for two courses.*"

Again he testified (Vol. 18, p. 8644):

"Q. And the Charleston mat has three layers, and that makes 18 inches?

A. Yes, as I understand the Charleston drawing combined with the specifications as stated by you, would require 18 inches in the finished jetty.

Q. In the finished jetty, yes. If you considered, then, that made into one mat and bound together and made up for a whole mattress in each layer, for the surface measure of the two layers fastened together you think there would not be much difference *between the cost* of this

(two course Carter multiple mat) Exhibit 331 as a completed mattress, and the Charleston mats, isn't that what you stated?

A. That is what I stated, I should not expect to see any special differences, but the man who was in the business and knows all about what he is going to pay for his work, *might* bid much lower for one than the other."

Now, Carter paid 95 cents per square yard at Savannah and $1.10 per square yard at Cumberland Sound for the square yards *in each course* of his multiple mat or for a two-course multiple mat he paid $2.20 per square yard of top surface, as against 82 cents paid by General Gilmore for the Charleston mat which Bixby says if they were let by the same contract, ought to be about the same in cost.

Notwithstanding this Carter has put in evidence (Vol. 26, p. 13235) a table in which he compares his *single* course mattress at 95 cents with this three course Gilmore's Charleston mat at 82 cents, and under which table it is stated the second and third Gilmore design are "virtually the same" as Carter's first and third design.

The difference between the cost of a layer of a multiple mat and of a separate single course mat made in accordance with the specifications is shown by the following:

Capt. (*now General*) *W. M. Black* made an estimate (Vol. 2, p. 748) of the cost of the second or third design Carter designs of mattress at 60 cents per square yard, based upon the prices prevailing in the Florida district in 1889-90 for the second design mattresses towed out and sunk singly, which he had constructed there.

But this was for a mattress made with fascines built by

laying the brush so as to break joints and to make a fascine extending continuously clear across the 75 or 100 foot mattress. And it was for a single mattress, floated and towed out and sunk one at a time on an ocean bar. (Vol. 2, p. 692.)

He estimated (Vol. 2, p. 749) that a *course* of the multiple mat at the same rate of material and labor would be 47 cents, as against 60 cents when sunk singly. But this estimate for the *course* was for a full grillage of poles between each layer of fascines, as Carter first commenced to build the multiple mat (Vol. 2, p. 748) and not as he afterwards built them with only a half grillage between layers. This 47 cents per square yard estimate for the course, also, was for the fascine specified, viz.: the "continuous" fascine built as Black had built them (Vol. 2, p. 692) and not for the 15-foot brush bundles as Carter had put them in.

So that according to Black's estimate the simple change from single mattress built and handled separately to the multiple form diminished the cost 13 cents per square yard, which in 1,363,572 square yards would mean $177,264.36 reduction of cost, or additional profit to the contractor.

But this estimate of Major Black took into consideration only the change of form and method of sinking the mattresses.

It did not take into consideration the immense saving made to the contractors by reason of the fact that they were allowed to put in brush bundles only 12 or 15 feet long, laid end to end across the mattress in lieu of the continuous fascine specified. All the witnesses, even of the defense, testify that that modification was made under all the contracts, although the requirement of a continuous fascine was maintained in the specifications through all the contracts from 1892 to 1897. (See main brief, pp. 275-6.)

O. M. Carter testified before the Board (Vol. 2, p. 515):

"Q. (By Major Adams.) Did you describe the fascine in the specifications?

A. Yes, sir; I described it. The fascines are described in paragraph 39 of the specifications for Cumberland Sound. There I say that the fascines shall be from 30 to 100 feet in length.

I modified that length, and required them to be built in shorter lengths, because I found that *it was delaying the execution of the work, and it was impracticable to carry* them as long as 30 feet, so I ordered them to be built 15 feet."

Capt. Black then made an estimate in detail of the cost of a single course of a multiple mat, in the manner Carter had testified that he had constructed it, and reached the conclusion that it ought not to have cost over 33.8 cents per square yard. (Vol. 2, p. 806.) Major Gaillard's estimate was 32 cents per square yard. (Vol. 2, p. 808.) The difference between 60 cents per square yard, Black's estimate of cost of the mattress sunk singly, and 33.8 cents per square yard of a course when sunk in multiple form as Carter claims he constructed it is 26.2 cents per square yard, or $357,255.95 on the 1,363,572.36 square yards put in under the big contract of 1892.

Col. F. A. Mahan, witness for defense, testified before the Court Martial relative to the above provision in the 1896 contract at Savannah (Vol. 6, p. 3065):

"Q. Do you consider the specifications, calling for fascines, from 30 to 100 feet in length, to be complied with by fascines uniformly from 15 to 18 feet in length?

A. For special cases the officer is bound to use them.

Q. Throughout the entire contract?

A. No, sir; it says, in general a mattress should be that; but if the general length is 30 feet, *an occasional fascine* of 18 feet, for special purposes, is certainly within the discretion of the officer.

Q. Suppose that 18 feet is the maximum length in mats 50 by 100 feet?

A. The maximum length of the fascine, if the maximum length of the fascines is only 18 feet, the specifications require in general 30 feet; undoubtedly the specifications are not complied with.

Q. The specifications require 30 to 100 feet, and they have been uniformly from 15 to 18 feet in length; 18 being the maximum; would you think the specifications were complied with?

A. The specifications are undoubtedly not complied with if the maximum is 18 feet."

To like effect is the testimony of Col. Bixby, witness for the defense, to which we will presently refer.

Difference in Cost of Continuous Fascine.

Capt. Gillette testified (Vol. 23, p. 10891):

"A. There is a very great deal of difference between building a mattress with long fascines, 30 to 100 feet long, and building a mattress with short ones, from 15 to 20 feet long. The difference is this: The mattress must be built in either case near the shore, either on ways on the shore, or ways on a lighter moored to the shore.

To get that material out of the woods where it is cut—and it of course cannot be all cut in the immediate vicinity of the building place—it has to be hauled; cannot carry in by hand; it is too far; they build a few mattresses at one place and brush may have to be hauled two miles or two and a half miles. It is necessary to haul it in wagons. To haul loose brush in wagons a contractor would be in a precisely similar position as a farmer is who wants to ship his hay to the market. It is too bulky; the transportation costs too much. He bales the hay. The contractor for the same reason puts his brush into bundles.

If he builds his fascines 30 to 100 feet long in the brush camps, he cannot haul them on the wagon; there is no practical way that he can haul them. He must, therefore, put it up into bundles from 12 to 20 feet long, compress it considerably so that he can get a reasonable amount on one wagon load.

Now, if he is building these matresses of the short bundles 12, 15, or 20 feet long, he uses those bundles that he makes in the woods to make his mattress; but if he must build them 30 to 100 feet long, particularly if they have to be thoroughly made, he must cut all these bundles

open, use the brush as if he had freshly obtained it, and make those fascines all over again carefully."

Col. Bixby, witness for the defense, on cross-examination, testified (Vol. 18, p. 8651) that if instead of putting a continuous fascine, running clear across the mattress, the contractors were allowed to put in the fascines made up of 12 or 15-foot bundles laid end to end that:

"It ought to make considerable difference in the cost, it depends altogether on the cost of labor and local surroundings."

He testified that under his specifications at Winyaw Bay similar to Carter's second design he made the contractors build the fascines continuously clear across the 90-foot mattress, laying the brush so as to break joints. (Vol. 18, p. 8650.)

The Specifications of the Fascines.

There is a curious ambiguity or vagueness of description of the fascines required for the second and third designs of mattress in Carter's specifications, which we insist was purposely put there by Carter in drafting the specifications, to force all bidders not in the conspiracy to bid on the idea of putting in a continuous fascine, but to enable Carter by a lax and fraudulent construction of the specifications (as charged in the bill) to allow Greene and Gaynor to put in the short bundles.

Take for instance contract 4820 for Cumberland Sound of 1892, and see the description of the fascines to be used in the respective mattress designs (Vol. 22, p. 10132):

In the clause for the second design mattress, the fascines were to be continuous extending completely across the mattress, and the brush laid so as to break joints. But in that clause it does not state the diameter of the fascine, nor its

length, except that it is to extend across the mattress. And you will have to look to a subsequent general clause relating to all mattresses to get the dimensions of the mattresses and dimension of fascines.

In the clause for the third design, it is not there stated whether the fascines are to be built continuously or not, whether they are to extend clear across the mattress or not or what diameter they are to have. The inference, however, is strong by reason of the fact that the continuous fascine is prescribed in the preceding clause, and from the fact that the length of fascines prescribed in the subsequent clause is the same as the width of mattresses, that all fascines were to be continuous.

Then follows a general clause as follows (Vol. 22, p. 10133):

> "The size of the mattresses will be fixed by the Engineer Officer in charge from time to time. In general they will be from sixty (60) to one hundred (100) feet in width, have such length as may be convenient for handling."

Then there is this clause:

> "40. All fascines will be made of live brush, etc. * * * The fascines will be from sixty (60) to one hundred (100) feet in length, and must be compressed tightly by an approved form of choker to a diameter of nine (9) inches at intervals of 2 feet, etc."

It is clear that since the option was with the engineer to call for either the second or third design, that the specification of the "continuous" fascine reaching clear across the mattress being in the second design, that all bidders not in the conspiracy would in any event be forced to bid on the idea of putting in the "continuous" fascine.

Col. Bixby very rightly testified that in construing specifications this general description of fascines would be read into the clauses describing the designs of mattresses where fascines are referred to and not described. (Vol. 18, p. 8656.)

He testified that under those specifications fascines made up of 12 or 15-foot bundles laid end to end, would not be in accordance with the specifications. (Vol. 18, p. 8661.)

He testified (Vol. 18, p. 8657) to same effect in regard to contract 6515 for Savannah harbor of 1896, where the fascines are described as from 30 to 100 feet.

Notwithstanding that Carter admitted before the Board, as we have seen, that he had modified the contract specifications by allowing the contractors to put in the 15-foot bundles, we now have Carter's counsel claiming that there was no requirement in the specifications for the third design in any of these specifications that they should be continuous or extend across the mattress. (Vol. 18, p. 8655.)

If this were true it would not change the situation because all other bidders not in the conspiracy had to bid on the continuous fascine anyhow, because they would not know but that Carter would require all of the second design brush mattress.

Carter testified before the Court Martial that the provision in the Cumberland Sound contract of 1896, No. 6517, that the fascines must be from 30 to 100 ft. in length was a mistake of his clerk in writing out the specifications. (Vol. 8, p. 3924; Vol. 18, p. 8744.) But the same provision is in the following contracts:

No. 6515 Savannah Harbor of 1896 fascines	30 to 100 ft.
No. 6049 Darien Harbor, etc., of 1895 fascines	30 to 100 ft.
No. 4820 Cumberland Sound of 1892 fascines	60 to 100 ft.
No. 5253 Jekyl Creek of 1893 fascines	60 to 100 ft.
No. 5811 Cumberland Sound of 1894 fascines	30 to 100 ft.

There are too many of them to credit Carter's assertion that the requirement in the specifications was a mistake of his clerk.

In the big contract for Savannah harbor of 1892 No. 4960, the dimension of the mattresses are stated to be in general from 20 to 100 feet in width (Vol. 22, p. 10156), and the length

of the fascines are stated to be from 12 to 100 feet. But here again the second design mattress calls for a continuous fascine extending clear across the mattress, while the clause for the third design is silent. But by reason of the fact that the bidder not in the conspiracy would not know but that the second design would be called for by the engineer he was forced to bid on the idea of putting in the continuous fascine. Now, since Carter never required anything but 15-foot fascines, and knew that it caused expense and delay to a contractor to build the continuous fascine, why did he follow the 1892 contract by specifying in all the subseqpent ones for fascines from 30 to 100 and from 60 to 100 feet in length, and built continuously? Why should he have shut out competition for the short fascine in all these contracts.

Judge Kohlsaat found the financial evidence shows that enormous profits were divided from these contracts, but fails to find the particular thing which created that profit, while here is one thing plainly before the eyes of the court. The learned judge said (Vol. 1, p. 374):

> "Indeed it does not appear that continuous fascines added anything to the merits of the mats."

Why specify them in contract after contract, then?

Again he says (Vol. 1, p. 374):

> "On the other hand, it is claimed with reason that the use of the short fascines resulted in a saving of labor and trouble to the contractor. Under the circumstances, it cannot, however, be said to have been a departure from the contract such as would have enabled the engineer to require of the contractor a reduction in the price bid. It would seem that the use of the term '12 to 100' feet in length should be construed as disclosing an intention to afford the engineer all the latitude reasonably to be required in the changing conditions of the work, between those extremes."

This, however, begs the question. If the term "12 to 100" feet in contract 4960, could be tortured into an excuse for 15-

foot fascines under that contract in view of the other requirements in regard to the continuous fascine, what can you do to reconcile a 15-foot fascine with the requirements that the fascines must be from 30 to 100 feet in length in contracts 5811, 6049 and 6515, and from 60 to 100 feet in contracts 4820 and 5253?

The question here is not only the departure from the specifications in a material way that cheapens the thing bid on to the contractor, and expressly called for a modified contract approved by the Secretary of War, but beyond all that Carter's retention of the continuous fascine requirement in the subsequent contracts, while he required from Greene and Gaynor only 15-foot bundles in the work, is overwhelmingly proof of a knowledge that he was deliberately forcing the letting of contracts at high and exorbitant prices, while accepting cheaper material than that specified.

Estimates of Cost of the Multiple Mats as Carter Actually Built Them.

Mr. E. A. Gieseler was a civil engineer who served under Capt. O. M. Carter in the Savannah district from 1889 to 1890 and 1893 to 1897, when Carter left (Vol. 3, p. 1322). It appears that Gieseler was never in charge as superintendent of construction work. His work was office work, and making surveys and estimates for projects of improvement, etc. It was Gieseler who made all the surveys, calculations and estimates for Carter upon which the project of 1890 was based. (See Carter's report, Vol. 26, pp. 13355 and 13361.)

Mr. Gieseler made a detailed estimate of the cost to the contractor of the several types of mattress in place in the jetty based on cost of material and labor in the Savannah district with results as follows:

Log and brush mattress, Carter's first design (Vol. 3, p. 1323), 68 cents per sq. yd.

Single mat, Carter's second design (Vol. 3, p. 1324), 56-4/5 cents per sq. yd.

Single mat, Carter's third design (Vol. 3, p. 1325), 43-1/5 cents per sq. yd.

A single course of an 8-course multiple mat as built under 1892 contract (Vol. 3, p. 1325), 11-2/5 cents per sq. yd.

The Government was paying the contractors 95 cents per square yard for each course of the multiple mat, which Carter treated as a single mattress under the contract of 1892.

Gieseler is the man who is referred to in the opinion of Judge Kohlsaat (Vol. 1, p. 379) as follows:

> "Gieseler, an engineer in Gillette's employ testified to the value of Carter's work, and was dropped from Government employ shortly after so doing by Gillette."

This statement is based merely upon an assertion of Carter's counsel in his statement of "The Witnesses and Their Testimony," p. 40 and 85, without any reference to evidence to support it. It is not justified by the testimony of Gieseler, which was strongly in favor of the Government on the essential features of the case, nor is there any evidence indicative of the fact, unless it be the bare fact that after some months Gieseler left the service of the Government and returned to Europe, and that fact is all that this slur upon Capt. Gillette is based on.

That statement of Judge Kohlsaat was made by the acceptance by him of said statement in the brief of counsel for Carter, unsupported by any evidence.

It is submitted that Gieseler was not only thoroughly competent by reason of his employment, to make a fair estimate, but that greater weight should be attached to it, if as the defense claims he was so friendly to Carter.

Arthur S. Cooper, assistant engineer under Carter during the putting in of the multiple mats under the 1892 contract at Savannah Harbor and who knew more about the facts as to what did go into the mattresses, and the local conditions, than any other witness in the case, made a detailed estimate (Rec., Vol. 3, p. 1177) of the cost to the contractors of one course of an 8-course multiple mat in place, with the result that he found it cost 9 cents per square yard.

The main criticism made by the defense is that in getting at the cost to the contractor of the whole 8-course mat Cooper estimated (Vol. 3, p. 1177) "cost of securing the contract $1 per mat."

He testified that this was an allowance made of $25,000 for expenses of securing the whole contract by lobbying. (Vol. 3, p. 1210.) That this item was put in by hearsay, and that if he had left it out it would have decreased the cost per square yard in the estimate. (Vol. 3, p. 1247.) The item of $1 may be stricken out of the estimate, which distributed through 2,000 yards of mat there estimated for, would make a difference of 1/20 of a cent per square yard, less than the result reached by Cooper.

That there was some lobbying done to get the appropriations through Congress, by P. Sanford Ross, who got the dredging contract, and by John F. Gaynor, who got the jetty contract, is indicated by the letter of Ross to Carter January 27, 1893 (Vol. 8, p. 3767), but of course Cooper should not have made them an allowance for that in estimating the cost of the mattress.

Marion Twiggs, who was assistant engineer under Carter during the execution of the 1896 contract at Cumberland Sound, and personally superintended all the work there, and was familiar with all the local conditions there estimated the cost of a course of the multiple mat as put in there at 10 cents per square yard in place. (Vol. 3, p. 1159.)

The Government paid $1.10 per square yard at Cumberland Sound under that contract.

Paul J. Keating, who was inspector of mattress construction under Carter at Savannah harbor in 1894 (during the very short time he had any inspection at all, see main brief, p. 361), made a detailed estimate of the cost of a course of an 8-course multiple mat in place, as there constructed, and reached the result of 10 1/10 cents per square yard. (Vol. 3, p. 1360.)

The Estimates of the Cost of the Multiple Mat by Government Witnesses, Substantiated.

The documentary evidence shows that under the series of contracts 1892-1893-1894-1895, the contractors, after paying all expenses of the work and making large allowances to the younger Gaynors, divided up proceeds of the contracts as net profits equal to 241 per cent. on the cost of the work. (See main brief, pp. 512a, 512d.)

It also shows that the net profits under the 1896 contracts at Savannah harbor and Cumberland Sound were over 500 per cent. on the cost of the work. (See main brief, p. 507).

These calculations were based upon including the exorbitant allowances made to the younger Gaynors in the cost of the work, and therefore the percentage or profits was even greater than the above figures would indicate.

What Would Have Been Reasonable Profit.

John W. Rutherford, witness for Carter, who testified that he had prepared a bid for the 1896 Cumberland Sound contract, which he did not put in, testified (Vol. 2, p. 747) that to the estimated cost of the work to the contractor, he would add 10 per cent. for contingencies and 20 per cent. for profit.

"I should say 20 per cent. added and ten per cent. for contingencies would be a fair margin. The 20 per cent. ought to be added any way."

George W. Brown, who was on the jetty work as assistant engineer under Carter in 1889, testified as witness for Carter (Rec., Vol. 2, p. 852) that 25 per cent. profit over actual cost to a contractor was a reasonable allowance to cover cost and contingencies.

Capt. W. M. Black, who was in charge of the Florida District where the conditions were similar to those in the Savannah District, testified (Rec., Vol. 5, p. 2538) that 25 per cent. was a reasonable margin to allow a contractor for profit and contingencies over estimated actual cost.

Estimates by the Defense Witnesses.

Carter attached to his final statement before the Board of Inquiry an estimate made by Lieut. Thos. H. Rees. (Vol. 2, p. 1035.) Lieut. Rees shortly after he graduated served a time in the Savannah district under Carter, but left there in April, 1893. (Vol. 25, p. 12303.)

The record shows that while Rees was in the Savannah district, Carter had been constructing what is known as a "continuous mat" made up of three or four courses of mat, built at the jetty and played out over the end of a barge. (See main brief, p. 346.)

But it was not until September, 1893, that the multiple mattresses built all on a barge eight and ten courses high was commenced to be used in Savannah district. (See main brief, p. 347.)

Rees was, therefore, not in the Savannah district during the construction of the multiple mats about which these other estimates were made. He testified he never saw a multiple mat, launched from a gin barge (Vol. 6, p. 2876).

Rees left Savannah in 1893, not only under financial obligations to Carter, but his conduct there has left him under a cloud. (See main brief, pp. 331 to 333.)

Rees returned to Savannah in 1898 and endeavored to aid Carter in his defense. (See main brief, p. 333.) As to his controversy with Gillette, see main brief p. 336.

Rees' Estimate.

An examination of Rees' estimate will show that it is not an estimate for a multiple mat built on a barge at the shore, with the barge towed out afterwards to the jetty, and the mat launched therefrom, but is an estimate for the "continuous" mat built over the end of the barge at the jetty.

This is seen by the fact that he estimates (Vol. 2, p. 1035):

1st. For hauling by wagon the fascines from the place where the brush is cut to the lighter at the water's edge.

2nd. For loading the fascines on the lighter.

3rd. For towing the lighter so loaded, out to the mattress (being built at the jetty).

4th. For laying the fascines in the mattress.

5th. He goes through the same processes for the poles, and estimates for several trips of the lighters carrying the poles separately from the fascines.

His estimate, therefore, is for a mattress built and put in entirely different from the multiple mat in controversy, and was for the continuous mat which he saw before he left Savannah in April, 1893. For that kind of a mattress he reaches the result of 66 cents per square yard for each course.

Rees included in his estimate an allowance of $20,250 per annum for deterioration of a plant estimated at $45,000, which he reduces to 10 cents per fascine, whereas the Atlantic Con-

tracting plant under the 1892 contract cost but $26,932.50 and they had the same plant intact in 1896 with the exception of a few barges. (See main brief, p. 512d.)

He allows 8 cents per fascine for superintendence, bookkeeping, etc.

He allows 6 cents per fascine for contingencies.

He allows over 3 cents per fascine for royalties for cutting brush on private lands.

He figures out the initial cost of making a single 15-foot fascine at 31 cents for labor irrespective of the cost of hauling and towing.

Now, the undisputed testimony is that Greene and Gaynor paid for the 15-foot fascines complete only 4 cents per fascine.

See testimony of Phillip Hopper (Vol. 9, p. 4432).

See testimony of E. B. Parker (Vol. 9, p. 4442).

Clarence Cole, foreman for Greene and Gaynor, witness for defense, testified (Vol. 7, p. 3494), that under the 1892 contract for Savannah harbor, each laborer was required to make 50 fascines per day and he was paid from 85 cents to $1.25 per day. At a maximum, this would be but 2½ cents per fascine. This was for the 15-foot fascines. (Vol. 7, p. 3488.)

What is Rees' estimate worth when he figures it out at 31 cents for fascines 15 feet long, which is about 700 per cent. above the actual cost?

G. W. Brown, who had been an assistant to Carter on jetty work in 1889, before the time of these frauds, and for whom Carter had gotten a place with him in 1897 under the Nicaragua Canal Commission (Vol. 7, p. 3312), testified before the Board that he had estimated the cost of the third design mattress, such as actually went into the work under him (in 1889), at 80 to 85 cents per square yard, but he gave no details of his estimate. (Vol. 2, p. 852.)

He testified that 25 per cent. profit over actual cost to a contractor was a reasonable allowance to cover cost and contingencies. (Vol. 2, p. 852.)

Carter Gave Greene and Gaynor the Brush from Government Reservation Free.

Carter, as Engineer Officer in charge, was in control of several large Government reservations, well supplied with brush and pole material in the vicinity of the contract work. He did not state in the specifications that the contractor would be allowed to get brush there free, but after the contracts were let he gave Greene and Gaynor that privilege free.

See Carter's letters granting said privilege:

Letter May 5, 1891, as to Fort Clinch reservation, Cumberland Sound. (Vol. 11, p. 5308.) This was on the next day after making contract 4572 for Cumberland Sound.

Letter of September 16, 1892, as to same reservation. (Vol. 11, p. 5309.) This was the very day that contract No. 4820 was let.

Letter November 28, 1896, as to Point Peter and Fort Clinch reservations, Cumberland Sound. (Vol. 11, p. 5311.) This was at the time work on contract 6517 was commenced. This was where Greene and Gaynor obtained most of their brush and poles used for Cumberland Sound.

They did, however, obtain some brush and poles from private land owners in the vicinity. But for this they only paid $5 per multiple mat of eight courses, 50 by 100 feet. (Vol. 9, p. 4448.) Such a mattress would have over 4,000 square yards in it, counting the square yards in each course, which would be about 1/8 of a cent per square yard.

Lieut. Rees for the defense, in his estimate, allowed 3 cents per fascine for royalty to owner for brush and poles, and he

calculates there would be 5/3 yards of a square yard to a fascine, or a royalty of 5 cents per square yard for cost of brush and fascines, which was 40 times the actual cost to the contractors.

For Savannah harbor they got their brush still cheaper. Carter had obtained an interest in what is known as the Hunting Island property as appears from the financial part of the main brief. This island was near the mouth of the Savannah river on the South Carolina coast. He was interested therein with a Mr. Garnett and a Mr. Mackall.

Mackall and Garnett gave the Gaynors the right to get brush there at a $1 per mat. (Vol. 7, p. 3283.) This was $1 for a barge load, the whole multiple mat. (Vol. 7, p. 3287.)

Where the Brush Camps Were Located.

The counsel for defendants in his oral argument before the lower court, has told the court that brush was so scarce that the contractors had to go 95 miles for it. Instead of that being the fact, the evidence shows to the contrary.

The Government reservations at Fort Clinch and Point Peter from which the brush under the 1892 and 1896 contracts was obtained (Vol. 3, p. 1155) was right on Cumberland Sound in the immediate vicinity of the work. Fort Clinch is on Amelia Island (Vol. 22, pp. 10093-96) and the jetties at Cumberland sprang out on one side from that Island. The brush under the 1894 contract at Cumberland Sound, was obtained mainly from private parties in the immediate vicinity of the work, not more than two or three miles. (Vol. 4, p. 1621.)

Under the 1892 contract for Savannah harbor Charles Sweeney, witness for defense testified (Vol. 25, p. 13066) that the multiple mats were obtained principally from a place

called Foot Point at Hilton Head on the South Carolina coast, the towage from the place where they were obtained to the places where they were being sunk being from 12 to 35 miles. The distance from Savannah to the mouth of the river was about 20 miles, and the mattresses were distributed at various point. Paul J. Keating, who was located at one of the brush camps called Dutch Island in 1894, says it was 10 or 12 miles by water from the City of Savannah. (Vol. 3, p. 1357.)

It is true that Sweeny testified that they towed log mats some 45 miles prior to 1891 (Vol. 9, p. 4500) and to same effect (Laird, Vol. 9, p. 4497). But this related to log mattresses of which the record shows that there was none put in after 1890. Laird does say he towed brush mattresses 95 miles (Vol. 7, p. 3464), but it was certainly not under the 1892 or 1896 contracts or his testimony conflicts with the other witnesses.

No Scarcity of Brush.

There is not a single witness who testified that there was any scarcity of brush, or that it was hard to get or costly.

On the contrary, it was so plentiful that Carter was giving it away at Government reservations, and other people were selling it at from $1 to $5 for a multiple mat for which the contractors were being paid from $3,600 to $4,000 each.

The Fascines Which Were Put in Singly in 1892 *Contract.*

Judge Kohlsaat, in his opinion (Vol. 1, p. 371), says:

> "It is not charged in the bill that $1.60 per cubic yard for fascines was unreasonable."

We think it is clearly charged in the bill that by reason of

suppression of competition that all these contracts were let at high and exorbitant prices.

In the contract of 1892 there was specified 300,000 cubic yards of fascines, 9 inches in diameter (Vol. 22, p. 10163), which were to be put in the work separately, *i. e.*, not in mattress form, and the Atlantic Contracting Company bid $1.60 per cubic yard for them. (Vol. 22, p. 10169.)

As matter of fact they did not put in under the contract but 208,124, cubic yards of fascines, as fascines. (Exh. 175, Vol. 31.)

The balance of the fascines which were to have been put in, were made into mattresses, and paid for at 95 cents per square yard for each square yard layer of fascines 9 inches thick, or equivalent to $3.80 for 36 inches of depth of brush, or $3.80 per cubic yard.

We insist, however, that even $1.60 per cubic yard for fascines was exorbitant.

Gillette let a contract at public bid to D. Powers & Co. in 1902 at the same place for 2,000 cubic yards of fascines or brush bundles (Vol. 9, p. 4543) at 51 cents *per cubic yard* (Vol. 9, p. 4545), and see (Vol. 9, p. 4453).

The quantities were less, but as there was no scarcity of brush around Savannah at any time, the larger quantities in the 1892 contract ought to have been furnished at a cheaper rate.

And see as to the much lower prices prevailing prior to the time of the conspiracy charged. (Main brief, pp. 262 and 250.)

How the Multiple Mats Were Constructed.

We can not do better than to refer to the testimony compiled in Main Brief under heads:

Introduction of Multiple Mat at Savannah, Sept., 1893, page 347.
Cooper's Description of Multiple Mat, page 350.
Connell for Defense Description of Multiple Mat, page 351.
The Multiple Mat, Built in "Steps," page 353.
Material Omitted by Change to Multiple Form, page 354.
Cost of Omitted Material, page 358.
Failure to Inspect Internal Construction of the Multiple Mat, page 359.
Carter Kept no Inspectors at Brush Camps, page 361.
Carter Made the Height of the Multiple Mat and Not Its Internal Construction the Test of Its Acceptance, page 402.

What Other Officers Say as to Carter's Failure to Report the Change to Multiple Form to His Superiors.

Capt. Black, witness for the Government, testified Vol. 2, p. 694:

"Q. (By Col. Gillespie): Had you been the constructing officer would you have thought it right and proper to have adopted and constructed a type of mattress different from what the specifications called for without the knowledge and authority of the Chief of Engineers?

A. No, sir."

Col. Ludlow, witness for defense, testified (Vol. 6, p. 3008):

"Q. If you made a change in the construction of the mattress, and used a multiple mattress with the half grillages left out in large quantities, would you not consider that a sufficient divergence from the terms of the contract to report it to the Chief of Engineers?

A. Yes, sir; I should report the fact that the mattresses were made in that way, undoubtedly."

Col. Bixby, witness for defense, had in 1889, at Winyaw Bay, S. C., a project almost precisely like Carter's Cumber-

land Sound project of 1895, viz., a stone jetty built on a foundation of brush mattresses ten inches thick (Vol. 18, p. 8673).

He testified:

"Q. Now, Colonel, suppose that you had come to the conclusion under your contract there that it would be better engineering to build up that stone dike not with the foundation course of mattresses as you built it there, but to keep building mattress on top of mattress 8 feet or 16 feet high, could you do it under those specifications without you modified the contract?

A. I do not understand that I could under these specifications."

Again he testified, Vol. 18, p. 8681:

"Q. You consider then that it was a mere matter of detail within your discretion without notifying the Chief of Engineers, and without making a modified contract with the contractors, to change that plan stated in those specifications and in that contract, into a jetty built up 16 courses high of brush mattresses without stone, would you?

A. No. I do not consider that to be a detail, but I say anything which I should think a detail that the contract and that the specifications authorize.

Q. That is what I am trying to get at all this time, as to the fact whether you call that a detail, a mere detail that you could change?

A. I individually do not treat the details in the same way that other officers perhaps treat them. I have my own view of my own work, and in my work I try to make the details very small.

Q. I am not trying to ask you what other officers think, I want to ask you what you say about it yourself, in your opinion would you call that a detail merely, a change that you could make,—making 16 courses of mattresses?

A. I would not think it was a detail, I should think it was something important.

Q. And, therefore, you would have in your own opinion, if you wanted to make that change, you would have to have it done properly by submitting a supplemental contract to be approved by the Chief of Engineers, would you not, or the Secretary of War?

A. Should certainly go to the Chief of Engineers and ask him in this particular case and in other cases which would be just like this, I would."

To fully appreciate this testimony see Main Brief, pp. 281-2.

Major Wm. L. Marshall, witness for defense, testified as to the Cumberland Sound project, Vol. 7, p. 3178:

"Q. Suppose in the majority of instances, covering almost the entire work, 14 courses were used, would you not report it to the Chief of Engineers?

A. Yes, sir; I would.

Q. That would be a departure from the terms of the contract of sufficient importance to report?

A. That would be such a departure unless the first mattresses had so far disappeared into the sand that it no longer be considered the foundation of the structure."

Capt. Black and Capt. Abbott, who were members of the Board with Carter which devised the project of 1895 for Cumberland Sound, both testified that that project contemplated only a thin foundation layer of brush mattresses, upon which was to be erected a stone jetty. The project reads:

"A foundation of brush mattresses, with a load consisting of a hearting of small stone, covered with heavier stone."

Carter claims that the use of the word "mattresses" meant as many layers of mattresses as he thought proper. He tries to substantiate this by the fact that the project estimated for 425,000 square yards of mattress. He says that this was more than could be used as a single foundation course.

But the figures show he is wrong in this (See Main Brief, p. 313).

After all the question is not, however, whether he violated the rules of the service so much as it is whether he exercised the discretions he claims he had, with intent to create profits for the contractors in which he shared.

A Single Thin Brush Mattress Would Have Been Better at Cumberland Sound, than the Entire 16 Courses of Multiple Mat.

Capt. Black testified (Vol. 5, p. 2539), that a mattress made of a single course of fascines, like the 2nd or 3rd design was worth more from an engineering standpoint, as a foundation for a stone jetty than the 8-course multiple mat. (Vol. 2, p. 706) and (Vol. 5, p. 2539).

Capt. Carter was of the same opinion before the time when he is charged to have entered into this conspiracy. (See his letter of May 22, 1888, Main Brief, p. 445).

Why brush structure not suitable for salt water, *The Terredo* (See Main Brief, p. 443).

The purposes of a thin layer of brush mattresses for a foundation for a stone jetty (Main Brief, p. 431).

Judge Kohlsaat's Misunderstanding as to Complainant's Position.

Judge Kohlsaat said, Vol. 1, p. 368:

> "Until Carter pursued this method, it is asserted, mats had always been purchased by the cubic yard. This does not seem to be justified by the evidence. Mats had been paid for by the square yard by Col. Black in 1888 and 1890, Col. Bixby 1889 and 1890, Capt. Carter in 1891 and Col. Stanton, 1892."

The position of complainants was this, that when a *brush jetty* was to be built up of fascines or mattresses it was paid for formerly in the Savannah District *by the cubic yard* of material; but that when a thin layer of brush mattresses was to be laid singly as a foundation course for a *stone jetty*, it was perfectly proper to pay for it by the square yard.

This was pointed out plainly in Main Brief, pp. 435-438 *et seq.* It is there pointed out that the Black mattresses of

1888-90 were single mattresses for a foundation course for a stone jetty on an ocean bar.

Also (Main Brief, p. 440), that the Bixby mattress of 1889-90 was likewise a single mattress 10 inches thick, for the foundation course for a stone jetty on an ocean bar. And Col. Bixby testified that the mattress specified and used was practically the same as that specified in Carter's second design (Vol. 18, p. 8601), except that he points out that the Winyaw Bay mat had an extra course of binder poles around the edge of the mat (Vol. 18, p. 8602).

Also Col. Stanton's mattress of 1892, for Winyaw Bay was for the continuation of the Bixby jetty, and the mattress was precisely the same as Bixby's 1889-90 mattress, and for a thin foundation course only. See testimony of Bixby (Vol. 17, p. 8500).

Now, all these single mattresses used by these other officers had to be constructed separately, floated separately by the use of light barrels or logs, and towed out and sunk separately with a load of stone on each mattress. See Black's testimony (Vol. 2, p. 693), and Carter's testimony (Vol. 7, p. 3595). Bixby testified that it was impractical to build the second design mattress in multiple form, that they had to be laid separately (Vol. 18, p. 8649). As we pointed out to the court below (Main Brief, p. 438). The very use to which these fascine mattresses used by Black, Bixby and Stanton were put —a single foundation course—the necessity of putting them in one at a time, with no other mattress to be superimposed on it, made it proper to pay for it by the square yard as log mattresses had been paid for, because they, too, could only be constructed and handled separately.

But, after taking bids on, and letting the contracts on specifications calling only for such single mats to be put in separately, Carter put in at one time *as one structure,* a mattress called a multiple mat, 8 and 10-course high—a structure about

50x100 feet in length and width, and 8 to 10 feet high—practically a pile of brush fascines piled up as cord wood would be with only a layer of poles spaced 8 feet apart between the layers of fascines, and a full grillage of poles at the top and bottom of the mattress, and the whole wired together, handled and put in as one structure, and paid for each course as if it were a single mattress. This was done by Carter under all the jetty contracts let from 1892 to 1897.

We are not now considering the question of Carter's departure from the project, and from the contract of 1892 for Savannah Harbor, which was for a jetty built up of *alternate layers of mattress and stone.* (Gilmore had built them with alternate layers of log mattresses and stone.) Nor are we now considering the question of Carter's departure from the project, and the contract of 1896 for Cumberland Sound which was for a *stone jetty* on a mattress foundation. The sole point is that if Carter knew before hand that he was going to build up at these places great brush jetties, and for that purpose was going to use the multiple mattress, put in as one structure, and which required but one towage, and one sinking, he should have specified for it and allowed other bidders to bid on it *by the cubic yard* for the material (as had invariably been done in the Savannah District previously when a brush jetty was built, Main Brief, p. 250), or if he chose to let the contract by the square yard, it should have been only by the square yard in the top surface of the multiple structure.

We shall presently point out that the evidence shows that Carter did know prior to the letting of a large number of these large contracts, let subsequent to the fall of 1893, that he would use practically nothing else but the multiple mat.

General Gilmore at Charleston, had a three-course mattress, which as we have seen Col. Bixby testified, would be at the same place about the same in cost as a two-course Carter multiple mat, *but Gilmore required bids by the square yard*

for the top surface of the whole structure. We pointed out (Main Brief, p. 250), that the documentary evidence shows that in every contract let in the Savannah District by Gilmore, or by Carter previous to 1891, where it was a *brush jetty* to be built up of fascines, laid in singly or in mats, the material was to be paid for by the cubic yard.

It is pointed out (see Table, Main Brief, p. 262), that the letting of these contracts previously by the cubic yard of fascines laid in the jetty either singly or in mats, made the cost to the Government of the brush jetty range from 70 cents to $1.10 per cubic yard for the fascine material in the jetty.

Col. Bixby, witness for the defense, testified (Vol. 18, p. 8622), on cross-examination that it would take 4 of Carter's third design mattresses laid in courses made up of fascines 9 inches thick, placed on top of each other, to give a yard in depth of fascine material in the jetty, or three of such mattresses if the fascines were 12 inches in diameter. In other words that it took 4 square yards of Carter's mattress, to give an equivalent to 1 cubic yard of fascine material.

Carter paid $1.10 per square yard for brush mattresses at Cumberland which made the cubic yard of fascine material in the jetty cost $4.40. He paid 95 cents per square yard at Savannah, which made the cubic yard of fascine material in the jetty cost $3.80.

This was a jump of about 300 per cent. in the cost of the fascine jetty over the prices previously prevailing in the Savannah District. Capt. Gillette put in evidence a table showing this jump in prices in 1891, which is copied (Main Brief, p. 246).

Explanation of the Jump in Prices.

In view of the fact that there is no evidence that any scarcity in brush material had taken place, but that the evidence shows that brush was plentiful and to be had almost for the asking in the immediate vicinity of the works, it is impossible to account for this sudden jump in the cost to the Government of the fascine jetty, otherwise than from the fact that every bidder under Carter's contracts had to bid on the assumption that he had to bid on the most costly design of mattress, and that each mattress had to be built, handled towed and sunk separately, with all the difficulties and expense attending the handling of a single brush mattress when so put in singly.

That if he were not in the conspiracy he would have to bid on the idea that every mattress had to be made up of fascines built continuously, clear across the 100-foot mattress and with the brush laid to break joints, with all the trouble and expense attached to that requirement.

These two things, which Carter waived in favor of Greene & Gaynor after the contracts were let, by accepting multiple mats, paying for each course as a single mat, and by accepting the short 15-foot bundles of brush just laid in, in lieu of the continuous fascine, and the suppression of competition by shortness of advertisement, by withholding specifications and by chilling proposed bidders, is the only rational explanation of the jump in prices *shown on the face of the contracts let,* taken in connection with the option exercised by Carter in allowing the cheapest design and quality of material to be put in, which by a lax construction he claims the specifications enabled him to exercise.

No Log Mattress Used in the Work by Carter from 1891 *to* 1897.

This is shown by evidence compiled (Main Brief, p. 271-2). Carter admits it (Vol. 18, p. 8775). Yet it was specified as one of the three designs, which the contractor might be required to furnish, at the engineer's option, in every jetty contract from 1891 to 1897.

No Second Design Mattress Used in the Work by Carter after 1892 *Contract.*

This is shown by the evidence compiled in (Main Brief, p. 285). Although the second design was retained in all the specifications to be called for at the option of the engineer.

Only a Few Second Design Mattresses Used Under 1892 *Contract.*

The evidence compiled in (Main Brief, p. 285), shows that there were only used 24,556 square yards of second design mattresses put in under the 1892 contract at Savannah Harbor, out of a total of 1,363,572 square yards of mattresses put in and paid for. And even as to the few put in they were not strictly second design mattresses, because they were put in as continuous mats two courses thick, and not second design mats sunk singly with a layer of stone on each mat. Carter admits that there were only a few second design mats put in under that contract (Vol. 18, p. 8762-3).

The Multiple Mats Were What Were Put In.

When work under the 1892 contract at Savannah was commenced, in December, 1892, the documentary evidence (Defendant's Exhibit 150, Vol. 29), shows that a few single mats were put in. It then shows Carter commenced to put in mattresses 3 or 4 courses at a time which he continued during the spring of 1893. Those mattresses were built at the jetty and played out over the end of a gin barge as built, being what the witness called the "continuous mat" They were built in three or four courses at a time with rock only on the top course (See Main Brief, p. 347).

In September, 1893, the sinking of multiple mats built on, and launched from a barge was commenced to be used under the Savannah Harbor contract of 1892. (See testimony compiled in Main Brief, p. 347.)

From that time on, the documentary evidence (Defendant's Exhibit 150, Vol. 29), shows that all or practically all the mattresses used were put in multiple form, 3, 4, 6, 8 and even 12 courses high, with only a small quantity of rock placed on the top of the multiple mat. All the witnesses besides agree on that, and Carter admits it. He testified (Vol. 7, p. 3598):

> "You see, the idea in the Savannah river was to build the entire dam at once, if I could, so as to get no more stone on it than was absolutely necessary; so I built the number of courses, necessary to bring it up to the height I desired, if I could do it."

Multiple Mat Authorized by Carter Under 1892 *Contract No.* 4820 *at Cumberland Sound May* 5, 1893.

Carter had, however authorized the use at Cumberland Sound of the multiple mat built in two courses launched from a barge, as early as May 5, 1893. See his letter to C. A. Felber, Inspector (Vol. 4, p. 1618), copied in main brief, p. 348.

Multiple Mats Were Put in Under 1894 *Contract No.* 5811 *at Cumberland Sound.*

E. R. Conant, Assistant Engineer under Carter, in charge of the Cumberland contract of 1894, testified that the mattresses there ranged from 2 courses to 7 and 8 courses high. (Vol. 4, p. 1624.) This was done under verbal instructions from Capt. Carter. (Vol. 4, p. 1631.) That the multiple mat had about one foot of stone put on top of it. (Vol. 4, p. 1624.)

Multiple Mats were Put in Under 1895 *Contract No.* 6049 *for Jekyl Creek.*

Conant was also inspector in charge of the work under that contract. (Vol. 4, p. 1617.) When work commenced under that contract Carter, under date of April 30, 1895, wrote Conant a letter of instructions, copied in Jekyl Creek letter-press book, p. 114, which contained the following provisions (Vol. 4, p. 1618):

> "In water four feet deep there will be three courses of mattresses; six feet deep, four courses; eight feet deep, five courses; ten feet deep, six courses."

He then specifies the width "For the three course mattresses," "For the four course mattresses," "For the five course mattress," and "For the six course mattress."

This contract is dated April 20, 1895, approved by Chief of Engineers April 29, 1895, and as these instructions were issued to Conant on April 30, 1895, there can be no question that Carter intended to use the multiple mat there before he let the contract.

Only Multiple Mats Were Used by Carter Under October 8, 1896, Contract at Cumberland Sound.

This appears from the documentary evidence and the compilation of the tri-monthly reports (Pf. Exhibit 369, Vol. 11, p. 5326) for Cumberland Sound. Carter testified before the Board that at the time the project of 1895 was made, he intended to use the multiple mat. (Vol. 2, p. 690-1.)

Only Multiple Mats Were Used by Carter Under October 8, 1896, Contract at Savannah, With the Exception of Three.

This appears from Pf. Exhibit 368, Vol. 11, p. 5321.

Carter's Excuse for Use of the Multiple Mat.

As to Savannah Harbor contract of 1892, *Carter* testified (Vol. 7, p. 3596):

> "And a careful examination of that work showed that we were not getting much vertical height, although we were expending a great deal of money, and of course, it worried me very greatly, because I feared I would not be able to carry out the work within the limits of the appropriation. I then began to devise some means whereby I might get those mattresses into place without having that undue settlement."

Lieut. Rees, witness for the defense, who left the Savannah District in April, 1893, and who testified he had never seen a multiple mat, launched from a barge, but had seen the continuous three course mat, testified (Vol. 6, p. 2849):

> "Q. For what purpose was the multiple mat loaded with stone adopted?
>
> A. That was adopted after considerable discussion. I remember at the time I talked with Capt. Carter, or he spoke to me about it, trying to devise some scheme to pre-

vent that excessive sinking, and finally the multiple mat was tried with a load of stone on top, instead of the single mats, each with a load of stone, and on top of that another mat."

He does not testify to the fact of the alleged excess settlement, except as that Carter spoke of it.

Richard F. Ensey, witness for defense, who it appears was a young civil engineer, who was employed in the earlier part of the work under the 1892 contract at Savannah, as a subordinate to Mr. Coulson, the assistant engineer under Carter (Vol. 7, p. 3352), testified he was put in charge of the work under Carter January 1, 1893 (Vol. 7, p. 3354).

On February 4, 1893, Carter wrote him a letter (Vol. 7, p. 3363) in which he uses this language:

"In short. your entire report is incorrect and untrustworthy in every respect."

"Such gross carelessness and disregard of orders will not be tolerated."

In May, 1893, Ensey was transferred from supervision of mattress work and put on triangular work, that was the last inspection work he did (Vol. 7, p. 3359).

Carter testified before the Board he changed Ensey from that work because of his inexperience (Vol. 2, p. 531).

He testified that he left the district in August, 1893 (Vol. 7, p. 3365), and he never returned to the district until the Carter trial (Vol. 7, pp. 3364 and 3372).

Ensey, when questioned by Capt. Carter, testified before the Board (Vol. 2, p. 522):

"Q. When you were down there on that work, on that training wall down there, what was the result of weighting each layer of the mattress with stone?

A. The wall was on soft bottom and very frequently that extra weight, any unusual weight on the wall would cause the sinking of the mat into the bottom. I remember it became a problem in my mind and in Capt. Carter's to design a mat that would not sink into the mud; in other

words to get the altitude, to get the height, without any more weight than would be necessary to keep the mat in position, and after that we used the double course mat and a single course mat."

Again (p. 525):

"Q. (By Capt. Carter.) You can run a pole down there 30 or 40 feet by hand?

A. Yes, sir.

Q. Is not the bottom of the Savannah River generally soft?

A. Yes, sir."

Cross-examined before the Court Martial he testified (Vol. 7, p. 3367):

"Q. What do you mean by saying you could run a pole down there 30 or 40 feet by hand; 30 was the minimum and 40 the maximum?

A. I remember that statement *was not made under oath*, and I explained to the Board at the time that my recollection was dim and vague—that I knew personally that the bottom was extremely soft at that point. That is all I meant by that statement."

Ensey testified (Vol. 7, p. 3355):

"My instructions from Capt. Carter, personally were always to the effect that the specifications were to be carried out to the letter, and the Government was to be protected."

He testified that the kind of mattresses they were putting in were the continuous mats (Vol. 7, p. 3354).

He testified (Vol. 7, p. 3365):

"As I understand it the printed instructions contain a clause that expressly granted the engineer officer in charge the power to change any specification he saw fit."

This is the Ensey whom Judge Kohlsaat included with others when he says "all eminent civil engineers testify that the work was done according to contract."

This is the testimony that the defense relies upon to show that there was such subsidence of single mattresses covered

with stone, that Carter was driven to the multiple mat for the entire contract.

Against this is the fact that both under General Gilmore and under Carter for years both log mattresses and brush mattresses had been successfully used along the same stretch of river, under the following contracts:

No. 2744, Sep. 1, 1884 (Vol. 22, p. 9867).

No. 3282, Oct. 28, 1886 (Vol. 22, p. 9911).

No. 3282, Sup. Dec. 22, 1886 (Vol. 22, p. 9921).

No. 3890, Jan. 16, 1889 (Vol. 22, p. 9961).

No. 3890, Sup. May 6, 1889 (Vol. 22, p. 9981).

No. 4224, Nov. 5, 1890 (Vol. 22, p. 10037).

Navigable Depths Obtained.

Although these contracts were small compared with the big contract of 1892, the work under them had been so successful, that according to Carter's own Deft.'s Exhibit (Vol. 2, p. 900-1) there had been obtained a navigable channel depth from the city to the sea as follows:

1872.....18 feet navigable depth.
1885.....19 feet navigable depth.
1887.....21 feet navigable depth.
1889.....22 feet project practically completed.

If this is compared with General Craighill's statement (see Main Brief, p. 501) that when he was stationed at Savannah in 1853 there was but 9 or 10 feet depth of channel, it will be seen that the bulk of the depth had been gained prior to Carter's having done a particle of work under the project of 1890.

The actual navigable depths gained by Carter from 1891 to 1897 as shown by Carter's own reports, are stated in Pf. Exhibit 333, which is a table prepared by Capt. Gillette, verified and admitted to be correct (Vol. 25, pp. 12763 and

12785). It shows that there was an average gain of very nearly 4 feet in navigable depth from 1891 to June 30, 1897. These considerations show that the claim of Carter's counsel that the mattresses sunk out of sight, and that he did not discover that the river had a soft mud bottom until *after* the letting of the big contract of 1892, can not stand. If it were a fact, his former experience and his surveys and investigations made for the project of 1890, would have put him on notice of it *prior* to letting the big contract of 1892.

We ask the court to verify any alleged reference counsel for defense may make on this matter of brush mattresses sinking into the mud.

Carter's Excuse for not Specifying the Multiple Mats in Contracts Subsequent to 1893.

Carter claims that the reason for the use by him of the multiple mats in the ocean bar jetties constructed subsequent to 1893, was to prevent scour ahead of the jetties. This subject is fully treated in main brief, p. 431.

Major Black, who had successfully used the thin brush mattress as a foundation for a stone jetty in the Florida district 1886 to 1890, and whose second design brush mattress Carter copied into his specifications in 1892-1894 and 1896 contracts, testified that such a single course mattress was of more value from an engineering standpoint, for that purpose than would be the 8 courses or 16 courses of brush mattresses put in at Cumberland Sound by Carter. (See Vol. 2, p. 706.)

Black testified that he never knew of a single course mat used as a foundation course to sink into the sand. (Vol. 5, p. 2540.)

Carter knew that the brush structure in salt water was worthless. (See his letter of May 22, 1888, main brief, p. 445.)

The important question, however, is not whether the one method was the better than the other, but if the multiple mat was better why did Carter not put it in the specifications and contracts let subsequent to 1893?

Carter claims that he had fully discovered the alleged merits of the multiple mattress under the 1892 contracts at Savannah and Cumberland Sound prior to 1894. Yet as we have seen he still specified only for the single mats in subsequent contracts and used practically all multiple mats, to wit, in:

Contract 5811 of November 15, 1894, for Cumberland Sound.

Contract 6049 of April 20, 1895, for Jekyl Creek.

Contract 6515 of October 8, 1896, for Savannah harbor.

Contract 6517 of October 8, 1896, for Cumberland Sound.

As we have already seen he instructed the putting in of multiple mats at Jekyl Creek, contract of 1895, the very day after the contract was let. (*Ante*, p. 168.)

Carter testified before the Board that he intended at the time the project of 1895 was made for Cumberland Sound to use the multiple mat in that work. (Vol. 2, pp. 690-1.)

Alleged Gaynor Patent on Multiple Mat.

Carter stated (Board Record, Vol. 2), p. 516):

> "That it was not put in the specifications was for the following reason—that that method was patented by the Atlantic Contracting Company and to have put it in the specifications would have given that company the monopoly."

(Board of Record, Vol. 2), p. 553:

> "Q. (By Major Adams): Explain what is patented?
> A. The thing that I understand that is patented is the method of building and sinking those large layers.
> Q. (By Major Adams): Is it possible then for a man to put them in position by his own method?

A. (Capt. Carter): Yes, sir; it would be very difficult to do it.

I explained to all the contractors how I wanted this work done, and told them to go and look at the work, see how it had been done, asked them to look at the plant which the last contractor had, and in that way they knew how I desired it built.

I see now in view of what has been said, that criticism can justly be made against this. My object was to have something by which they could get around that patent, and therefore I spoke of single course mattresses."

Carter testified (Court Martial, Vol. 8), p. 3907):

"Q. Was any ownership in the Atlantic Contracting Company in that patent or invention ever brought to your knowledge?

A. I think I got the information from the members of the Atlantic Contracting Company who got the patent. I think it was William T. Gaynor."

Carter testified before the Court Martial that he did not recall any other specific reason for his not having specified for the multiple mats in these subsequent contracts other than the alleged Gaynor patent and "that there was absolutely no necessity for it." (Vol. 8, p. 3914.)

The alleged patent issued to W. T. Gaynor was put in evidence as Defendant's Court Martial Exhibit No. 44. It purports to be a patent (Vol. 9, p. 4332):

"For improvement *in barges* for transporting and launching mattresses for jetty work."

It shows that the patent was not applied for until December 23, 1895 (Vol. 9, p. 4334), and not issued until November 24, 1896. (Vol. 8, p. 4332.) It states (Vol. 9, p. 4337):

"My invention does not relate to the construction of the mattress, but to the means for transporting and launching it. It will be understood, however, that a mattress can be more conveniently constructed on my peculiar platform."

It will be seen, therefore, that since the alleged patent was not even applied for when contract No. 5811 of November 15, 1894, for Cumberland Sound, and contract No. 6049 of April

20, 1895, for Jekyl Creek were let, and since both of those contracts were let along after September, 1893, when the use of multiple mats launched from barges had been introduced, that the alleged patent would be no excuse for Carter's not having specified the multiple mattress in the specifications for those contracts, for he used nothing else but multiple mats in those contracts. (Vol. 18, pp. 8756-7.)

Moreover, Carter had been putting in multiple mats built over the end of the barge, five courses high, built in the continuous form, at Savannah harbor as early as the first part of the 1892 contract. (Main brief, p. 346.)

Moreover, Carter had by letter authorized the use of multiple mats at Jekyl Creek "constructed on barges and launched in place" as early as May 5, 1893. (Main brief, p. 348.)

Moreover, the contractors had been using the multiple mats launched from barges for two years prior to Gaynor's applying for a patent for his "method of launching." The excuse of Gaynor's alleged patent deterring Carter from specifying multiple mats to be bid on therefore falls to the ground.

Carter's Claim that he Put in Additional Material to Supply the Place of Omitted Fascines in Multiple Mats.

O. M. Carter, testified before the Board (Vol. 2, p. 696):

> "Q. I would like to have Capt. Carter state what he used at Cumberland Sound?
>
> A. Very well, what I used was the third design of brush mattress with the following *modification:* that when these mattresses were built, one mattress on top of another, the bottom grillage of the upper mattress was omitted and the top grillage of the mattress underneath used, *the amount of fascines being increased to make an equivalent of the poles* which would have been put in that grillage."

He further stated that the omission of the extra grillage

poles, was to prevent too much open crib work between the mattresses.

All the witnesses agree that if a jetty was to be built up of 8 or 10 courses of mattresses, in multiple form, that it would be better engineering to have as little open crib work as possible. The question does not turn on that, however, because the multiple mat was not specified, and the fact that other bidders had to bid on a form of single mattress, which had all the poles made the Government pay for the omitted material.

Carter's statement to the Board that he only omitted the bottom grillage of the superimposed mattresses, is true only for part of the work under the 1892 contracts. He subsequently omitted also a half grillage of poles from the top layer of each single course, as well as the full bottom grillage of the superimposed mattress retaining a full grillage at every "step." All the witnesses who saw the work go in testified to that. (See main brief, p. 350 to 352.)

Now, as to the alleged supply of fascines for omitted material.

We have a letter of instructions from Carter to his assistant Ensey, instructing the omission of poles, but saying nothing of supplying fascines in their place, and there are no written instructions produced which show that he ever instructed that the material should be so supplied. First Carter's letter of instructions to R. F. Ensey, inspector, of February 14, 1893 (Vol. 7, p. 3375), relative to Savannah harbor contract of 1892. He there says:

> "Should it be practicable to do so, double mattresses will be constructed and sunk at the same time, in order to save stone. In this case it will not be necessary to have two grillages, the top grillage of the bottom sufficing for the bottom grillage of the second course."

Not a word about substituting fascines for omitted grillage.

Captain Black testified (Vol. 2, p. 749):

"Q. (By Capt. Carter.) May I ask you how it is, if you build a mattress with the grillage underneath, with a fascine layer and a grillage on top, and build another mattress, replacing your grillage by fascine work, an equivalent amount of fascine work, how you make the difference in cost?

A. You cannot put more fascines in a layer to save your head.

Q. But men very often have two fascines instead of one, depending upon the size of the fascines?

A. I am just taking your specifications and putting the fascines on top of each other."

All the witnesses, both for the Government and defense, who were examined and who testified as to the manner in which the multiple mats were constructed, describe it as constructed in manner which makes no provision for putting in extra fascines for the omitted grillage poles. (See testimony compiled, main brief, pp. 350 to 352.)

Later Carter apparently abandoned the claim of putting in extra fascines in the courses, and claimed that he put in more material in the fascines, and that this was shown by the height of the multiple mattresses put in.

Indeed, the testimony shows that he withdrew all inspectors from the brush camps and barges where the great multiple mats 50 by 100 feet wide and 9 to 10 feet high were constructed, that he ceased to have the internal construction of the multiple mats inspected, and relied wholly upon the height of the mat, measured on the barge before launching at the jetty to determine the character and quantity of material in it. (See testimony compiled, main brief, p. 359.) Carter testified (Vol. 17, p. 8357):

"Q. You have already testified with regard to inspecting fascines and mats, have you not, that when you came to build them in multiple, that the height of the mats alone was sufficient to determine whether there was enough brush in them and that an inspection again would have been of no account?

A. No, sir; it would have been of no use to inspect them other than at the work, to determine whether the United States got what it paid for.

Q. The paying for these mattresses by the height determined exactly how much brush was in them?

A. Yes, sir; very much better than any other way."

A. S. Cooper, Carter's assistant engineer, testified (Vol. 23, p. 10919):

"I never saw the mats until they were brought to the river camps for placing in the work. They were brought there complete, ready for use and I had no opportunity of seeing them except from the outside.

Q. Take the multiple mats such as you have described, 50 feet wide, 100 feet long, 7 or 8 feet or more in height, how could you tell what was the interior construction of those mats?

A. It was impossible to tell exactly what the interior was composed of."

Cooper testified (see testimony compiled, main brief, p. 402-3-4), that after he returned to the Savannah harbor in 1893 Carter gave him a table of heights by which he was to be guided in accepting the multiple mats; this table of heights was as follows:

1 course, 2 feet in height.

2 courses, 3½ feet in height.

4 four courses, 5 feet in height.

5 courses, 7½ feet in height.

6 courses, 9 feet in height.

7 courses, 10 feet in height.

8 courses, 12 feet in height.

These heights included the height of the grillage poles as well as of the brush material between them. (See Cooper's testimony before Board, Vol. 2, p. 454, and before Court Martial, Vol. 4, p. 1259, and Conant's testimony, Vol. 4, p. 1527.)

Cooper testified (Vol. 23, p. 10923):

"He (Carter) afterwards reduced the figures some-

what so that the average was some little less than one foot and a half to a course. And then told me that if the mats came up to any one of those figures there to allow them those courses, no matter whether the courses were there or not. If they came to that height to allow them that number of courses, and that I declined to do."

If Carter had put in the full amount of grillage poles required by the specifications, since the average diameter of the poles specified was 4½ inches, and since the bottom grillage is formed by the crossing of two poles, this would give 9 inches of height for the bottom grillage, and similarly 9 inches of height for the top grillage, or 18 inches of the height of a single course mat due to grillage. And since the height given Cooper for acceptance was 24 inches for the single course mat, it left but 6 inches for the thickness of the brush fascines between the grillage poles.

Cooper testified that Carter reduced even those heights and the documentary evidence shows it.

Documentary Evidence of Height of Mattresses at Cumberland Sound.

There was a complete record kept in Carter's office of the height of the multiple mats under the 1896 contract at Cumberland Sound. (See main brief, p. 413, and see table, p. 414.)

These records show that the height of the eight-course multiple mats at Cumberland under the 1896 contract measured on the barge, measured from eight to ten feet. The average height was only about nine feet.

Carter testified that the average height was nine feet nine inches. (Vol. 18, p. 8771.)

Immediately after launching with a layer of stone only about one foot thick on them, they were measured, and the shrinkage was about a third of the height. These multiple mat-

tresses at Cumberland Sound were constructed with only a half grillage between the courses of fascines, and a simple calculation (See main brief, pp. 415-416) shows that the thickness of the fascines between the grillage poles was only about 6.75 inches before the multiple mat was sunk, and only about 2.9 inches after sinking.

That it was largely the grillage poles which gave height to the mattress appears from Carter's letter to Felber of May 5, 1893 (see main brief, p. 348-9), where Carter says:

> "Each course should be built of a double thickness of mattresses, the grillages being of *good sized poles, in order to obtain* vertical height."

Hypothetical Questions to Col. Bixby.

Counsel for Captain Carter asked Colonel Bixby certain hypothetical questions, based on the alleged height of multiple mats put in under the 1892 contract at Savannah, based upon a totally false premise as to the construction of the mat.

He assumes for the Savannah harbor mats of 1892 the form of arrangement of grillage poles as were used under the 1896 contracts at Savannah and Cumberland, and then on that false premise calculates what must have been the thickness of the brush layers.

Instead of taking the Cumberland Sound eight-course multiple mats in 1896 which ranged only from eight to ten feet in height on the barge, he assumes the height to be twelve feet high for the eight-course multiple mat at Savannah, but assumes that the arrangement of poles in the Savannah mats of 1892 were the same as they were at Cumberland in 1896.

Carter testified (Vol. 18, p. 8771):

> "The instructions were that the height (of the multiple mats) should be the same at the two points (Savannah Harbor and Cumberland Sound), but in the 1892 contract

the heights at Savannah were greater on account of a different arrangement of grillage poles, as I have explained."

What that difference was is shown by the testimony of the witnesses.

At Cumberland Sound, there was only a half grillage of poles between the course, except at the steps, as we have seen.

At Savannah Harbor, under the 1892 contract, Carter testified before the board that there was a full grillage of poles between the courses of fascines, and that he omitted only the bottom grillage of the superimposed mattresses. (*Ante*, p. 170.) And this appears also from his instructions to Ensey under the 1892 contract. (*Ante*, p. 171.)

Moreover, the testimony shows that even after they ceased to use the full grillage of poles between all the courses under the 1892 contract, that they kept a full grillage at every "step," and also at the next to the top course, as well as at the top and bottom of the multiple mat. And whereas the documentary evidence shows that the eight-course Cumberland Sound mats were built only in two steps, the Savannah Harbor eight-course mats were built in four steps. (See sheet 23 of Defendant's Exhibit 150, Vol. 29, as to the number of steps in the eight-course mats 12 feet high in Savannah contract of 1892.)

It will be seen at once that that construction at Savannah requires large excess of grillage poles which give height to the mattress over the Cumberland form of construction. In other words, although Carter had omitted about half the poles in the Savannah contract from what was called for in the specifications he still had a form of construction which made the multiple mat largely composed of open crib work.

In the hypothetical question put to Colonel Bixby (Vol. 17, p. 8469) counsel assumes that in the eight-course Savannah Harbor multiple mat under the 1892 contract, there were but

14 rows of binder poles left in, and later on he has Colonel Bixby figure these rows of binder poles as only four inches in diameter. (Vol. 17, p. 8473.)

The contract shows the diameter of these poles were to be from four to five inches (Vol. 22, p. 10156), which is an average of 4½ inches.

Now, taking the eight-course multiple mats shown on sheet 23 of Defendant's Exhibit 150, Vol. 29, built as is shown in four steps: If there were a full grillage between each course and a full grillage at the top and bottom, as Carter testified before the board there was, there would be nine full grillages or 18 layers of poles in the mat, which at 4½ inches each would make 81 inches or 9 feet of height due to grillage poles, instead of 14 poles at 4 inches, 56 inches or 4 2/3 feet as the hypothetical question to Colonel Bixby puts it.

And if you take the 9 feet of height due to grillage poles from 12 feet total height of mat it leaves but 3 feet or 36 inches due to height of 8 courses of brush, or 4½ inches thickness of brush between grillage poles, instead of 11 inches as Col. Bixby figures it out (Vol. 17, p. 8483) on Mr. Stone's false premises.

If on the other hand, there were only full grillages at the top and bottom, and at the next to the top, and at each step as the witnesses testified there were in cases under the 1892 contract (main brief, p. 352), and half grillages between the other courses it would make 16 layers of poles to give height to the mat which would give at 4½ inches to the pole 72 inches or 6 feet of the height due to poles, and 6 feet due to the 8 courses of fascines, making 9 inches due to the thickness of a layer of fascines.

The specifications called for a fascine 9 inches at the choke, and Colonel Bixby testified that this ought to give the general diameter of the fascine between chokes of 12 inches. (Vol. 18, p. 8598.)

Now, there is no evidence whatever to enable us to determine just exactly which form of crib-work was used in these 8-course mats at Savannah Harbor. The value of the expert testimony is, however, destroyed by the assumption of the false premises. The same hypothetical questions based on false premises were put to other witnesses, and their testimony is equally valueless.

The whole theory is false.

Any one knows that the amount of material in a pile of brush cannot be determined alone from the height, but depends upon the compactness of the brush.

Work Under 1892 Contract Buried Under Water.

Carter testified (Vol. 17, p. 8392) that at the time of the court martial, it was impossible to inspect the work done under the 1892 contract at Savannah, "because most of its was covered with mud and all of it practically covered with water."

There was abundant evidence, however, of just what was done under that contract. (1) From the testimony of the witness who saw the work go in, and (2) the documentary evidence from the records of Carter's office.

Experts.

A number of officers from the Corps of Engineers testified in Carter's behalf as to customs of the engineer service, or as experts on construing specifications or projects. They were in the main personal friends of Captain Carter, who hoped he was innocent, and did the best they could for him.

If the testimony of these witnesses on cross-examination be sifted it will be seen that in all the vital issues in the case the testimony of most of them was vitally against Captain Carter.

Col. Bixby did not testify before the court martial. He testified in the present civil proceedings in response to hypothetical questions only.

On cross-examination his testimony on all vital questions were strongly in favor of the Government.

General Craighill's Testimony.

Judge Kohlsaat in his opinion (Vol. 1, p. 279) says:

> "Major Rees and General Craighill find no fault with Carter's construction of the contract."

We have already disposed of the testimony of then Lieutenant Rees.

If the court will examine the brief of General Craighill's testimony (Main brief, pp. 498 to 501) it will be seen that he never examined the work according to his testimony, sufficiently to form an opinion.

"Other Eminent Engineers."

Judge Kohlsaat says (Vol. 1, p. 379):

> "Lyman E. Cooley, Wisner, Burgyn, Schermerhorn, Blandford, Rutherford, Burnett, Brown, Ensey and Ford, all eminent civil engineers, testify that the work was done according to contract."

We have already disposed of *Ensey*.

Campbell Ford was only an inspector under Conant, Carter's assistant engineer in 1893, at Augusta. (See main brief, p. 329.) He was an inspector under Mr. Cooper at Savannah a short time in 1894. (Vol. 6, p. 3144.) Look at his testimony as to the construction of the multiple mats that he saw from the "outside" and see how worthless it is.

G. W. Brown was one of Carter's assistants in 1889. Car-

ter got a job for him in 1897 under the Nicaragua canal commission, as we have already seen. (Vol. 7, p. 3312.) He testified that the fascines made by the Gaynors in 1889 were good. (Vol. 7, p. 3295.)

But what has that to do with the work from 1891 to 1897?

R. S. Burnett was an assistant under Carter constructing mining casements in 1895 at Fort Pulaski. It does not appear that he had anything to do with the contract work. He did not testify in the case, but Carter annexed his affidavit to Carter's final statement before the board. (Vol. 1, p. 986.) This affidavit the board refused to receive because he did not submit to cross-examination. (Vol. 18, p. 8811.)

In this affidavit he says he made brush mats under General Gilmore at Cross Tides dam in 1891. General Gilmore died in 1888, and he evidently meant 1881. He says that he never heard anybody say the work was badly done in Savannah. (Vol. 2, p. 986.)

J. W. Rutherford was a contractor. He never testified that he saw the work. His testimony was on a different subject. (See main brief, p. 288.)

R. A. Blandford was a civil engineer, who testified about getting some samples of rock off the jetties, and helping Mr. Wisner make a survey of the 1896 work. (Vol. 6, p. 2993.) He also testified about helping Ripley to compile certain tables from the Chief of Engineer's reports. (Vol. 6, pp. 3010 to 3048.)

He did not testify that the work was well done.

His tables, which were for comparing cost of mattresses, were all wrong. (See main brief, p. 466.)

L. Y. Schermerhorn was also a contractor. He did not testify that the work was well done. His testimony was wholly on the subject of bidding and the relative price of the different designs of mattresses. (Main brief, pp. 233 and 290.)

C. P. E. Burgyn was a contractor. He did not testify that the work was well done. His testimony was wholly on the subject of bidding and the relative price of the different designs of mattress. (Main brief, pp. 234-294.)

Lyman E. Cooley may be an eminent civil engineer, but it does not appear that he ever visited the Savannah District. *His testimony was wholly that of an expert given in answer to hypothetical questions.* He appears for the first time as a witness in this civil suit for which he has rendered a bill for services for 16 days as an expert at the rate of $100 per day.

George Y. Wisner was employed by Carter during the courtmartial to make certain surveys on the 1896 contract at Cumberland Sound and on the 1896 contract work at Tybee breakwater. His testimony is discussed in main brief under the appropriate heads. (See main brief, p. 442.) His surveys were demonstrated to be absolutely wrong. (Main brief, p. 463-4.)

Judge Kohlsaat further says (Rec., Vol. 1, p. 378):

> "Captain Gillette's successor, Colonel Quinn found Carter's work in Savannah Harbor in excellent condition as late of 1903."

But 1903 is five years after 1897, and as we have already seen Carter himself testified the details of the work could not be seen even in 1897, because it was buried under mud and water. Colonel Quinn (Rec., Vol. 9, p. 4505) testified that after Carter's leaving the district in 1897 there had been expended on the Savannah Harbor work under Captain Gillette during his five-year term, and under Quinn, amounts aggregating $847,658.94.

He testified that his statement as to the conditions of the jetties related solely to the conditions in which he found them in 1903 and not to the condition in which Carter left them in 1897. (Rec., Vol. 9, p. 4504.)

That no such testimony was given or could have been given

by these alleged experts based upon an examination of the details of the work done under the big contract of 1892 which was completed in 1895 or under the contract of 1896, appears from Carter's own testimony (Rec., Vol. 17, p. 8392), where he testifies that at the time of the courtmartial it was impossible to inspect it "because most of it was covered with mud, all of it practically covered with water. See also Capt. Abbott's testimony (Rec., Vol. 2, p. 813), to same effect.

We regret to be again called upon to say that the learned Judge was led into making such erroneous statement through his acceptance of wild assertions made in the brief of Carter's counsel, without verification from the record.

The Military Fascine and Engineering Fascine.

The position of the Government on this subject has been wholly misrepresented by counsel for defendants, and misstated in the opinion of the Circuit Court. The position is fully stated in Main brief, pp. 483-4-5. That position is that if Carter intended to allow the use of the so-called engineering fascine or brush bundle, he should not have made his specifications so as to make other bidders bid on what was practically a military fascine. It is not a question of which was best for the purpose intended.

Attack on Major C. E. Gillette.
The Willink Matter.

Among the charges on which Carter was tried before the courtmartial was:

Charge 3: "Conduct unbecoming a gentleman."

Specification 19 was for knowingly misrepresenting facts to the Chief of Engineers as to his reasons for not doing

the Hutchinson Island work in letter of October 21, 1896, as follows:

> "When operations were to begin excessive rentals were demanded by property owners, some of whom had taken possession of wharves as a speculation with a view to obtaining excessive damages. The work would have been delayed and its cost increased by about $50,000, and it was therefore abandoned."

Carter's counsel charged that *Willink* testified before the courtmartial in 1898 that he had not made any such demand for rental *from Carter*. Carter left the district July 17, 1897.

It appears (Vol. 18, p. 8941) that Willink filed a suit August 3, 1897, on which Gillette made a report October 8, 1897, (Vol. 18, p. 8944.)

An examination of this suit will show that it throws no light upon the question as to whether Willink did or did not make a demand upon Carter, which caused him as he says in the beginning of the work under the 1892 contract to abandon that improvement. The suit filed by Willink was filed on a wholly different theory. He charged in that suit that he was prevented from improving his property, and the Government's improvements were not made; that the notice given him amounted to "a taking" of his property, and that by the delay and abandonment of the project he had been damaged.

Carter's counsel say that because Gillette knew of this suit filed long subsequent to Carter's letter of October 21, 1896, the failure of Gillette to bring it voluntarily forward before the courtmartial without being asked about it was fraudulent suppression of evidence.

This claim is not only ridiculous, but there is no evidence to support it.

The charge that Carter was guilty of conduct not becoming a gentleman has nothing to do with this case.

In the lists of witnesses who testified before the courtmar-

tial whose testimony was to be used before the lower court, under the agreement neither party named Willink, and his testimony is not in the record. Neither is the charge and specification 19, on which his testimony was taken before the courtmartial in the record. This whole matter is *de hors* the record with the exception of the fact that Willink filed suit August 3, 1897.

We have discussed it simply because the attack on Gillette was made on that ground in the Circuit Court of Appeals, and in the Circuit Court "Requests for findings," p. 137 and Carter's brief of evidence, p. 463-464.

Relative Cost of the Three Designs of Mattresses.

Judge Kohlsaat in his opinion (Vol. 1, p. 365) says:

> "Major Black, of the Engineer Corps, for complainant testified that he did not consider it right to require one price bid for all three designs, but states that mats two and three were of substantially the same value and both worth more than design one, based on prices paid at St. Augustine and St. John Harbor, Florida."

The learned judge omitted to state that Major Black made an estimate and testified that there was a difference in cost of 13 cents per square yard between the single mat second design specified, and the "course" of the third design when put in, in multiple form, which would make a difference of $177,264.36 on the 1,363,572 square yards put in under the contract of 1892. (*Ante*, p. 140) The learned judge also omitted to notice that the testimony of Major Black, as to the relative cost of the three designs, was based upon the idea of the second and third designs being built with continuous fascines and sunk singly. (*Ante*, pp. 140....)

That Black testified that when the courses were paid for as if they were single mats, but built in multiple form as Car-

ter testified he built them, that it made a difference of 26.2 cents per square yard in cost to the contractor, or a difference of $357,255.95 on the 1,363,572.36 square yards put in under the big contract of 1892. (*Ante*, p. 141.)

And that in comparing the log mattress, he took the price of the brush mat sunk singly at a cost of 60 cents in 1889-90 and compared it with the price of log mats in 1886 at St. Johns bar. (Vol. 2, p. 748.)

That there was a very great difference in the prices in 1886 from those in 1889-90 in the Savannah District is shown by the table. (Main brief, p. 262.)

In 1886 the log mat in Savannah District was 38 cents square yard.

In 1889 the log mat in Savannah District was 63 cents square yard.

In 1886 the 9-inch fascine mat in Savannah District was 28 cents square yard.

In 1889 the 9-inch fascine mat in Savannah District was 34 cents square yard.

This table shows that at the *same period* the relative price of the log mat was double that of the fascine mat, in the Savannah District.

That being true in Carter's own district, why did Carter join the two styles of mats in one specification to be bid on at one price, reserving to the engineer the option to determine which style of mat he would take after the contract was let?

And why did he accept all of the cheaper kind of mats from Greene and Gaynor, and never put in a single log mat in the work from 1891 to 1897?

The Shortness of Advertisement.

Judge Kohlsaat in his opinion reviews some of the evidence showing that the contracts in question were not sufficiently advertised. He says (Vol. 1, p. 363):

> "In a table showing the time of publication in seventeen contracts ranging from 1890 to 1896 under Carter's direction the notice in no instance exceeded 27 days in the local papers and 23 days in the engineering journals. These were all approved by the War Department."

The table referred to is copied into appellant's main brief, p. 125.

Recollecting that the bulk of the contractors for great contracts, scattered all over the United States, who ought to be reached to insure the competition as required by the Act of 1888 (main brief, p. 126), would not be reached by the local papers, but by the engineering journals in which such contracts are usually advertised, examine that table and see if the above extract from the judge's opinion fully states the facts.

An inspection of the table shows that many of these contracts were not advertised but 11 days in the engineering journals.

Contract No. 4572 of 1891 let to J. F. Gaynor which was work estimated at $97,500, and under which the prices jumped 300 per cent. from previous contracts, was advertised in the engineering journals but 11 days.

The big contract of 1892, $3,150,000, was advertised but for 23 days in the engineering journals. The two big contracts of 1896 aggregating $3,355,000, were advertised but 19 days in the engineering journals.

In view of the fact that contractors after seeing the advertisements had to get copies of the specifications, examine the

ground and sources of material, etc., is there any doubt that the notice was not sufficient to ensure competition?

The defendants put in a table (Vol. 26, p. 13349-54) made up from the reports of the Chief of Engineers to show that other officers in the Corps of Engineers had advertised large contracts for less than 30 days.

The remarkable thing about that table is, that while it does show that prior to 1888 when the contracts were comparatively small, and before the Act of Congress was passed, many contracts were so advertised for less than 30 days; but that *after* the Act of August 11, 1888, not a single jetty contract appears in that list, and no contract of any sort, except two small dredging contracts let by Major W. S. Stanton in 1894, one at Roanoke, N. C., for $25,656.82, and one at Beaufort, N. C., for $8,744.51, but what were advertised for 30 days or more. And as to those two small dredging contracts they were advertised (Vol. 26, p. 13349) for a calendar month, but the month was February, and the time was 28 days. Moreover, they were probably emergency lettings, to remove some temporary filling up of channels, a fact which the compilation does not show.

It would appear, therefore, that the other officers did obey the spirit of the Act of August 11, 1888, while Carter did not.

It appears that a failure to consider the facts brought out in this table in connection with the change in the law in 1888 misled both Senator Edmunds and the judge in the court below, in excusing Carter because "others did it."

Senator Edmunds said (Vol. 18, p. 8987):

> "The evidence of some army officers tends to show that in respect of such works a long advertisement is entirely useless. I do not think it is."

But the learned judge of the court below said in the extract already quoted, that the length of time Carter's advertisements had run had been approved by the War Department.

The finding here is not only contrary to the regulations established by the Secretary of War, but contrary to the evidence of the chief clerk of the War Department as to what was done, and contrary to the documentary evidence. The fact being that the chief clerk fixes *the number of times* the advertisement is to run, but not the length of the time.

This subject is fully covered by Main brief, pp. 127 to 139.

But whether approved by his superior officers or not, the fact that Carter was primarily responsible for the shortness of advertisements cannot be denied.

His motive for doing it must be arrived at not by that fact alone but by considering it in connection with the proof of all his other acts, which resulted in the suppression of competition, high prices, and the evidence that he was a beneficiary of the enhanced profits.

It is suggested that contractors keep the run of appropriations made by Congress and do not need to be informed by advertisement of lettings.

But a reference to these acts of Congress will show that they do not enable contractors to learn from them any of the details of the work or when the specifications will be prepared or advertised, or other matters which may delay the lettings for months.

Suppression of Competition by Withholding Specifications.

The learned judge cites a few of the minor facts bearing on the subject of suppression of competition by withholding specifications. He has wholly failed to refer to the most important evidence on that subject. We refer to the evidence under this head. (Main brief, p. 157 *et seq.*)

Information to Greene and Gaynor in advance as to which Design of Mattress Carter would Elect After the Letting to go Into the Work.

Judge Kohlsaat (Vol. 1, p. 365), says:

> "Complainant alleges that while Carter embarrassed other bidders by including the three designs as of one price, he advised Greene and Gaynor that he would use the third, so that they were able to underbid the other bidders. There is no direct evidence in the record to sustain this charge."

Carter Admits he Told Them.

Besides the large amount of circumstantial evidence in the case showing that Greene and Gaynor knew in advance which design Carter would call for, we have Carter's own testimony before the board that he did tell Greene and Gaynor (the Atlantic Contracting Company), among others, in advance that he would use all third design mattresses, except a few, and that while it was not so stated in the specifications, they had the pledge of "his honor" to carry it out. (See Main brief, p. 271.)

That he did not tell other proposed bidders who asked him is shown by the testimony of his own witness P. Sanford Ross (Vol. 25, p. 12922):

> "Q. Was there anything said at that time (1896) as to which of the designs was most likely to be used?
>
> A. No; I never could get Carter committed on that. He always reserved the right to use the design that was best adapted in his judgment to the location."

To like effect is the testimony of C. P. E. Burgwyn, another proposed bidder, witness for defense (Vol. 25, p. 12933):

> "As I recall, his explanation was that he found by experience that certain designs were practically better at one place than at another, and he desired the liberty of

using which design at the particular place, that the experience indicated as better at that place."

W. H. Venable, another contractor who had contemplated bidding on the 1896 contract testified (Vol. 23, p. 10575), that one of the reasons that made him decide not to put in a bid was that he could not get sufficient information as to which of the three designs of mattress the engineer might take so as to enable him to put in an intelligent bid.

Now, whatever may be the conflict in the oral expert testimony as to the relative values of the three designs of mattresses joined by Carter in the specifications to be bid on at one price, the documentary evidence (see table main brief, p. 262), shows that prior to 1891 in the Savannah district, at corresponding dates, the price of the brush mattress nine inches thick between binders corresponding to Carter's third design had cost only about one-half of the log mattresses corresponding to Carter's first design.

Capt. W. M. Black testified that the ordinary bidder, even if he had been told by the engineer that he expected to use principally one design would be compelled in order to protect himself to bid on the most costly design. (See Main brief, p. 284.)

The undisputed evidence shows that Carter did not require Greene and Gaynor to put in a single log mattress under any of the contracts from 1891 to 1897, and that his option was always exercised in favor of the cheaper design.

Moreover, instead of requiring even this cheaper single course mattress of the third design which required separate towing, handling and sinking, he allowed Greene and Gaynor to put them in in multiple form with a large part of the poles omitted, and so that they required but one towing, one handling and one sinking for 8 to 10 courses of mats paid for as if each course was a single mattress. (See Main brief, p. 343 and 343 note.)

The testimony shows that the construction of these multiple mats built on, and launched from barges was commenced in September, 1893.

That the cost to the contractor of a square yard in a course of multiple mat was only from 9 to 10 cents, while the single course mat put in one at a time as specified cost about 43 cents per square yard. (See Main brief, pp. 401-402.) Capt. Black estimated that the cost of the second design mattress as he had built them, when towed out one at a time and sunk singly on an ocean bar was abouut 60 cents per square yard. (Vol. 1, p. 748.) But when put in as courses in an eight course mat they would cost but about 34 cents per square yard. (Vol. 2, p. 806.)

Judge Kohlsaat in the court below says (Vol. 1, p. 371-2):

> "In addition, it seems, the single mats when separately loaded with stone for ballast, were apt to sink into the soft bottom of the river—sometimes to a depth of 70 feet."

There is no evidence that any such thing ever occurred except Carter's bare assertion.

The judge concludes (Vol. 1, p. 373):

> "There seems to be little ground for questioning the good judgment and skill of the engineer in charge, in causing the mats to be put together and used in multiple form."

But this conclusion begs the question. However, valuable the multiple mat may have been (a matter in strong dispute), the fact that it was a wide departure from the specifications, and that Carter did not submit to the Secretary of War the proposed change, and make a modified contract sanctioned by him, and that it vastly increased the profits of the contractors cannot be disputed.

Having proved the multiple mat efficient as he claims under the 1892 contract, is there any excuse for his failure to

specify it in the contracts subsequently let, so that all bidders would have an equal chance at it? He put in nothing else in under all the subsequent contracts.

Collusive Bidding.

Judge Kohlsaat found (Rec. Vol. 1, p. 368) that there was collusive bidding proved in the big contract of 1892 between Greene, Gaynor and the other contractors. (See Main brief, p. 180.)

Collusive bidding however could not have been made effective had it not been for the suppression of competition on Carter's part by shortness of advertisements and withholding specifications.

Forgeries Brought Home to Carter.

Special attention is called to the proof of the collusive bidding for the 1894 contract No. 5811 for Cumberland Sound, in which the forged bid of Anson M. Bangs was fixed up in Carter's office at the last minute by Carter's private secretary, Connolly, which bid was approved by Carter, although he must have known that the same was in the handwriting of his own secretary. (See Main Brief, pp. 205-210.) Special attention is also called to the forgeries of the assent of sureties to the $500,000 Supplemental Contract of March 17th, 1897, which are proved to have been committed by Carter's private secretary, Connolly, and approved by Carter under circumstances which bring a knowledge of the forgeries home to Carter at the time of his approval. (See Main Brief, p. 235.) These original documents are sent up to the court for its inspection.

Conclusion.

The foregoing is intended to cover only the most important features of the engineering work of construction. The other questions are covered by the Main brief.

Respectfully submitted,

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